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In The

SUPREME COURT of the UNITED STATES

October Term, 1966

Number 634

MINISTERS LIFE AND CASUALTY UNION,
Appellant,

vs.

ROBERT D. HAASE,
Commissioner of Insurance,
and
BRONSON C. LA FOLLETTE,
Attorney General of the State of Wisconsin,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

JURISDICTIONAL STATEMENT

ERWIN N. GRISWOLD
Langdell Hall
Cambridge, Massachusetts
Counsel for Appellant

FRANK A. ROSS
1 South Pinckney Street
Madison, Wisconsin
Of Counsel

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

JURISDICTIONAL STATEMENT

Appellant appeals from a final judgment of the Supreme Court of the State of Wisconsin entered on June 7, 1966, affirming a judgment of the Circuit Court for Dane County, Wisconsin, declaring Section 201.42 of the Wisconsin Statutes constitutional and applicable to the appellant in its insurance business with residents of Wisconsin, and requiring appellant to comply with its provisions, and submits this statement to show that the Supreme Court of

the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported at 30 Wis. 2d 339, 141 N. W. 2d 287. The opinion of the Circuit Court for Dane County, Wisconsin is not reported. Copies of the opinion and judgment of the Supreme Court of the State of Wisconsin, the dissenting opinion of Justice Gordon, and the opinion and judgment of the Circuit Court for Dane County, Wisconsin are attached hereto as Appendix A (pps. 1a to 42a), *infra*.

JURISDICTION

This suit was brought in the Circuit Court for Dane County, Wisconsin, under section 269.56 of the Wisconsin Statutes for a declaratory judgment that section 201.42 of the Wisconsin Statutes is unconstitutional and inapplicable to the appellant's business with residents of Wisconsin. The judgment of the Wisconsin Supreme Court was entered on April 12, 1966, and became final on June 7, 1966, on which date appellant's motion for a rehearing was denied. Notice of appeal was filed in that Court on August 26, 1966.

The jurisdiction of this Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1257(2) and 2101(c). The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U. S. 154 (1945); *American Oil Co. v. Neill*, 380 U. S. 451 (1965).

QUESTIONS PRESENTED

Does Section 201.42 of the Wisconsin Statutes, enacted by Chapter 397 of the Wisconsin Laws of 1961, purporting to regulate and tax out-of-state insurance companies which transact insurance business with Wisconsin residents by mail and are not licensed in Wisconsin and have no offices, agents, employees or property within Wisconsin, violate the Constitution of the United States for any one of the following reasons:

(a) Because it imposes a burden upon interstate commerce in violation of clause 3 of Section 8, Article I of the Constitution.

(b) Because it imposes a burden on interstate commerce in insurance in violation of clause 3, Section 8, Article I of the Constitution, and is not within the authority granted by Congress to the states by the Act of March 9, 1945, 59 Stat. 33, 15 U. S. C. Section 1011 (the McCarran-Ferguson Act) as construed in *State Board of Insurance v. Todd Shipyards Corp.*, 370 U. S. 451 (1962).

(c) Because it conflicts with the Act of Congress of March 9, 1945, 59 Stat. 33, 15 U. S. C. Section 1011 (McCarran-Ferguson Act) and therefore violates that portion of Article VI of the Constitution which provides that the Constitution, and the laws of the United States made pursuant thereto, shall be the supreme law of the land.

(d) Because it purports to extend Wisconsin's regulatory and tax jurisdiction to insurance transac-

tions outside the state by insurance companies not licensed in Wisconsin, in violation of the due process clause of the Fourteenth Amendment to the Constitution.

(e) Because its penal and other provisions with respect to out-of-state direct mail insurance companies, and with respect to Wisconsin residents who deal with such companies by mail, are arbitrary, unreasonable and discriminatory, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution.

(f) Because it violates Section 10, Article I of the Constitution by impairing the obligation of contracts.

(g) Because it violates clause 7 of Section 8, Article I of the Constitution, which grants Congress power to establish post offices and post roads by attempting to limit the right of appellant to use the United States mails.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Sec. 201.42 of the Wisconsin Statutes is set forth in full in Appendix B hereto (pps. 43b to 54b, *infra.*) Because of its length and complexity, the following summary of the statute is supplied.

The statute was enacted by the Wisconsin Legislature as Chapter 397 of the Laws of 1961. It became effective on August 19, 1961. In addition to enacting Section 201.42, the law repealed certain other existing statutes which dealt with the subject of insurance. Section 201.42 purports to define certain acts, including among other things the use of the mails, as "the doing of an insurance business" in the State of Wisconsin; characterizes the doing of such acts by insurers not authorized to transact business in Wisconsin as "unauthorized insurance"; prohibits the writing of unauthorized insurance in Wisconsin; requires an unauthorized insurance company to file a bond or to become licensed prior to its filing a pleading in any action instituted against it in the State or Wisconsin; declares contracts entered into by an unauthorized insurer to be unenforceable by the insurer; imposes a 3% unauthorized premium tax, and penalties for failure to pay such tax against any unauthorized insurer, and under certain circumstances the insured; and imposes severe criminal and civil penalties to be applied against any unauthorized insurer who does any such unauthorized acts of insurance and against any insured who fails, when required, to pay such tax.

The statute also provides for service of process upon the Commissioner of Insurance in the case of foreign insurance companies writing insurance upon Wisconsin residents. The section of the statute dealing with service of process was not drawn in question.

The McCarran-Ferguson Act of March 9, 1945, 59 Stat. 33; U. S. C. Title 15, Secs. 1011, *et seq.*, is set forth in Appendix B hereto. (pp. 54b to 56b, *infra.*)

The Federal Constitutional provisions involved are set forth in Appendix C. (pp. 57c to 58c, *infra.*)

STATEMENT OF CASE

This is a suit brought by Ministers Life and Casualty Union (Ministers), a foreign mail order insurance company not licensed to do business in Wisconsin, in which Ministers sought a declaratory judgment that Sec. 201.42 of the Wisconsin Statutes is invalid and unconstitutional, and that the appellant was not doing business or transacting business within Wisconsin; was not amenable to the statute; and was entitled to deal through the mail with residents of Wisconsin, including renewals of existing policies. Ministers contended that the statute is invalid and unconstitutional under the commerce clause, due process clause and other provisions of the United States Constitution. The provisions of the statute dealing with substituted service of process are not in issue.

Ministers was organized under the laws of Minnesota sixty-four years ago. It is one of the class of insurance companies which had their origin in the early "traveling men's associations" which served a selective class of members principally on a direct mail basis. (R. 220-222.)[1] It is now a mutual legal reserve life company selling accident, health and life insurance policies to ministers and professional religious workers in the United States and Canada. (R. 170-171.) Ministers is fully subject to investigation, regulation, and tax in Minnesota. (R. 204, 230.) Although it is licensed in nine states and all eight provinces in Canada and has agents in seven states and one province in Canada, it sells insurance principally by mail. (R. 172.)

The dollar savings from the direct mail method employed by Ministers has resulted in Ministers returning to its members in payment of claims a substantially higher proportion of the premium collected than is represented by the national average, and the cost of benefits conferred upon policyholders has been consistently below the cost of similar insurance written by agency companies. (R. 174.) Because of the limited number of persons eligible for membership, particularly in sparsely settled states, the direct mail method employed by Ministers has in its judgment been the only efficient and economical way to reach prospective members. (R. 205-207.)

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[1]The reference "R" followed by a number is the original record certified from the Supreme Court of Wisconsin, as paginated for this Court.

Wisconsin is a state in which Ministers is not licensed to do business, where it has no agents, and where it operates on a direct mail basis. It has no office, officer, agent, agency or representative in the State of Wisconson for the purpose of interviewing prospects, the solicitation of insurance, the taking and receiving of applications for insurance, the investigation of risks, the adjusting of claims, or otherwise servicing policyholders, or for any other purpose. (R. 172-173.) Individual insurance policies on Wisconsin residents are issued in Minneapolis, Minnesota on the basis of an application form completed by the insured and mailed to the Company at Minneapolis, and effective when so issued at Minneapolis, and such policies are delivered through the United States mail. (R. 199.) Premiums are payable at and all claims and losses are payable from Minneapolis. (R. 184, 190.) Ministers has never owned a bank account in the State of Wisconsin and owns no property within the State although it does own mortgages on certain Wisconsin real estate. (R. 173.)

Members are solicited exclusively by advertisements inserted by the appellant in church and church-lay publications having a nationwide circulation, and by the delivery by United States mail of letters, brochures and pamphlets describing its policies to potential members resident in Wisconsin. (R. 177-181) All contacts between Ministers and resident members, including the receipt of applications, the writing of policies and delivery of policies, the collection of premiums, and the investigation and payment of claims, are carried on in Minneapolis, Minnesota, through the use of the United States mail. (R. 200.)

If in the process of mail order selling Ministers needs additional information for underwriting purposes, it obtains it through correspondence with the applicants or from local doctors, or by obtaining credit reports from national investigatory agencies. For medical information, Ministers may use the family physician by mailing a medical report form to him, requesting that he fill it out and return it to the home office. Physical examinations when required are made by the family physician and occasionally by some other doctor selected by Ministers. All contacts between Ministers and the doctor are by mail. The doctors are not employees of Ministers and it maintains no panel of physicians or specific medical representatives in any state except Minnesota. Contacts between Ministers and the doctor are by mail. (R. 181, 185-186.)

Claims for accidental death and for disability under accident and health policies and for death which occurs during the contestable period of a life policy are generally investigated by national investigatory agencies which have no power to negotiate or settle claims and do not represent or act as agents for Ministers, but merely report to Ministers. (R. 192, 212-213.)

In the case of group life and group franchise accident and health insurance policies, Ministers frequently deals with a "group leader," representing the group, who may be the employer of the group, an officer (such as secretary or treasurer) of the group, or one of the members of the group selected by the group to act for it for the purpose of such insurance. Contacts between Ministers and the group leader are by mail or telephone, or personal visits in Minneapolis. In some cases a master policy is issued

in the name of the group, with a certificate to each member, and in other cases a separate policy is issued to each member of the group. The group leader is selected by and represents and acts for the group and not for Ministers, and receives no compensation in any form from Ministers. (R. 181, 212.)

Ministers is a small company and because of its restricted membership, its sales by mail to residents of Wisconsin, as well as to residents of other states, though continuous, are not large. (R. 176.)

There is a substantial movement of the Ministers' members from one state to another as ministers change parishes from time to time. The result is that as to about one in three of Ministers' Wisconsin policyholders, the policy now held by him was issued at a time when he was a resident of another state. (R. 149.)

How the Federal Questions Were Presented

All constitutional issues were raised in the pleadings and briefed and argued in both courts below. (See plaintiff's complaint, R. 125-127.) The Circuit Court for Dane County held that the statute did not offend against any provisions of the United States Constitution and that it, in terms, applied to Ministers. Plaintiff appealed, the only issue before the Wisconsin Supreme Court being the constitutionality of the statute.

The Wisconsin Supreme Court affirmed the decision below in an opinion by Justice Hallows. The court recognized and dealt with the several constitutional arguments

made by the appellant and held that the Wisconsin statute was valid and that it did not violate any of the constitutional provisions on which the appellant relied.

Justice Gordon filed a dissenting opinion in which he concluded that the Wisconsin statute was invalid under the Federal constitution, and did not come within the powers granted to the states by the McCarran-Ferguson Act.

THE QUESTIONS ARE SUBSTANTIAL

The case involves the question of whether a state may regulate and tax the mail order insurance business of a foreign insurance company. The statute enacted by Wisconsin is broad in scope. In particular, Section 201.42(2)5 provides that the issuance or delivery of contracts of insurance to residents of Wisconsin constitutes the doing of insurance business in Wisconsin. Under this, Wisconsin is asserting power to subject substantially all insurance transactions with its residents to its taxing and regulatory jurisdiction, regardless of the nonexistence of other contacts. If the Wisconsin statute is valid, as held by the court below, the existing system of regulating and taxing insurance sold by mail in this country will be transformed.

The Supreme Court of Wisconsin upheld the validity of the Wisconsin statute on the basis of an erroneous interpretation of this Court's decision in *State Board of Insurance v. Todd Shipyards Corp.*, 370 U. S. 451 (1962). In that case, the Court held that Congress, in enacting the McCarran-Ferguson Act, expressly indicated its intention to limit the powers of the states with respect to the regulation and taxation of insurance to those which had been

enunciated by this Court in certain previous decisions. The Court noted in *Todd* that this policy announced by Congress in the McCarran-Ferguson Act was one on which the industry had reason to rely since 1897, and that any change would have a severe impact on small insurance companies. Notwithstanding this holding in *Todd*, the Wisconsin Supreme Court ruled that the *Todd* decision was intended only to define certain "outer limits" of due process, and that it was still open to the states to enact regulatory and tax measures which went beyond the decisions adopted and in effect codified by Congress in the McCarran-Ferguson Act.

In 1944, this Court held in *United States v. South-Eastern Underwriters*, 322 U. S. 533, that the business of insurance was commerce. The result of this decision was to remove the traditional basis for state regulation of the insurance industry. Within a few months, Congress enacted the McCarran-Ferguson Act (Act of March 9, 1945, c. 20, 59 Stat. 33; U. S. C., Title 15, Secs. 1011 *et seq.*).[2] By this statute, Congress provided that "the business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business." The legislative history of the McCarran-Ferguson Act showed plainly, however, that Congress did not authorize the states to extend their jurisdiction, either to regulate or to tax, beyond that which had become established by 1945.

The report of the Committee on Interstate Commerce of the House of Representatives (H. R. Rep. No. 143, 79th Congress, 1st Session, p. 3) stated:

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[2]See Appendix B (pps. 43b to 56b, infra).

"It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer v. Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co. v. Arkansas* (260 U. S. 346), and *Connecticut General Life Ins. Co. v. Johnson* (303 U. S. 77), which hold, inter alia, that a State does not have the power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way."

On the floor of the Senate, Senator McCarran, who was the Senator in charge of the bill, read the foregoing part of the House Report, and then stated, ". . . we give to the States no more powers than those they previously had, and we take none from them." 91 Cong. Rec. 1442.

In determining what these powers were, it is necessary to review the developments which had occurred before 1944, when this Court finally determined that the business of insurance was commerce. In earlier years, the Court had had to deal on a number of occasions with state statutes regulating insurance transactions having only a limited contact with the regulating state. In dealing with this problem, the Court devised—and made constitutionally effective

under the due process clause—a fabric of rules based essentially on a determination of the state where the contract was entered into. Whether Louisiana is constitutionally permitted to regulate a contract which is formed, as was the one involved in *Allgeyer v. Louisiana*, by mail between a Louisiana insured and a New York insurer, covering transient property at that moment in Louisiana, was made to depend upon whether the contract was effective upon the dispatch of the acceptance or on its receipt.

These rules formed a sensible and highly practical means of allocating among the states jurisdiction to regulate and tax the business of insurance. If a company sent agents into a state to negotiate contracts, the transactions —taking place entirely within the state—could be taxed and regulated. If the insured and the insurer were both out of state, and only the property was in the state, the basic interest was outside the state, and accordingly the regulation of the terms of the contract was beyond its jurisdiction. When the insured and the insurer dealt only by mail, only the state of the insuring company could regulate the transaction.

Because of the common conception that insurance was not commerce, Congress made no effort to regulate the insurance industry. Thus the Court as arbiter of the Federal system was required to choose one state or the other; and since insureds are peripatetic while insurance companies are relatively permanent in their location and behavior, the rule was effective and workable. Placing regulation in the state of domicile of the company tended to create a national market in insurance. It was a part of the process

of making us a nation, rather than a Balkanized collection of separate states.

It is with this background that we must consider the specific endorsement of *Allgeyer*, *St. Louis Cotton Compress*, and *Connecticut General* by the Congressional Committees which formulated the McCarran-Ferguson Act. Prior to *South-Eastern Underwriters*, the states could regulate insurance transactions within their borders, but the Court determined what transactions were within their borders. *South-Eastern Underwriters* withdrew the basis for the whole regulatory scheme. If nothing had been done, all regulations would have had to be provided by Congress. Congress recognized its responsibility by adopting the McCarran-Ferguson Act. In doing so, it opened the door for the states to continue to regulate the insurance business, but equally it clearly sought to continue the limits on the states as they had been developed by this Court and were understood at that time. Without doubt, one limit on state action, never breached, had been that states could not prevent foreign companies which had not sought the benefits of local registration from doing insurance business by mail with their citizens. This is the firm holding of *Allgeyer*, and in affirming it Congress surely affirmed not the reasoning—that a mail contract was "formed" in the insurer's state—but its result, that some insurance contracts were so much a performance of interstate business, so little a local matter, that a state with minimal or limited contacts with the transaction ought not to be permitted to regulate or to exact tribute from it. Congress might later find that it needed to regulate such transactions, but until then regulation by the state licensing the company must suffice.

The effect of the McCarran-Ferguson Act, and the extent of the powers of the States, were considered by this Court in *State Board of Insurance v. Todd Shipyards Corp.*, 370 U. S. 451 (1962). Although there are factual differences between the *Todd Shipyards* case and the present case, the approach taken by the court in *Todd* should be controlling here, and should not have been disregarded by the court below. In the *Todd Shipyards* case, this Court said (370 U. S. 458) that—

> "Congress tailored the new regulations for the insurance business with specific reference to our prior decisions. Since these earlier decisions are part of the arch on which the new structure rests, we refrain from disturbing them lest we change the design that Congress fashioned."

In addition to the three cases mentioned in the House Committee Report, other restrictions on the powers of the States had been established by decisions of this Court. These included *Minnesota Commercial Men's Association v. Benn*, 261 U. S. 140 (1923), and *Boseman v. Connecticut General Life Insurance Co.*, 301 U. S. 196 (1937). The *Benn* case arose on facts closely similar to those involved here. Although it related to service of process, an issue not involved in this case, it remains, nevertheless, a due process limitation upon the power of the states to regulate and to tax. As such, it (and the *Boseman* case) was incorporated into the McCarran-Ferguson Act to the same extent as the three cases cited in the Committee Report.

No pre-*South-Eastern Underwriters* case sustains the validity of a statute such as the Wisconsin statute which applies to a non-licensed, foreign insurer writing contracts

outside of the state with no offices, officers, agents or employees within the state, and doing business by mail. The McCarran-Ferguson Act simply restored the pre-*South-Eastern Underwriters* situation, expressly recognizing the theretofore existing limitations on state power. There is thus no constitutional basis for the statute in question, and the decision below, which sustains the statute, raises a substantial question under the Constitution and the decisions of this Court.

THE QUESTIONS ARE IMPORTANT

If the validity of the statute here involved is ultimately sustained, more than 79 foreign, non-licensed insurance companies now writing policies on Wisconsin residents exclusively through the use of the United States mails will be affected. (R. 242.) The Wisconsin Commissioner of Insurance has already advised such companies by letter and a news release of the provisions of the Wisconsin statute. He has asserted that it applies to them; he has claimed a tax upon premium receipts from contracts either *effected or renewed*: and he has made demand for the payment of the premium tax for a period of six years prior to the adoption of the statute. (R. 265-278.) This potential liability runs into the millions of dollars.

It is clear that if the Wisconsin statute is ultimately determined to be valid, similar statutes will be adopted by many other states. We are advised that bills with this purpose are now under consideration in Kansas, Oregon, Illinois, California, and Florida.

The case is of great importance to the insurance industry, and particularly to the many smaller companies in the industry that have traditionally engaged in the sale of insurance by the use of the United States mail. Although this litigation has been brought by Ministers, which has a direct and vital interest in its outcome, the record shows that it is deemed to be of such importance that it has been financed by three trade associations, The Health Insurance Association of America, The Commercial Travelers Federation, and The Association of Insurance Advertisers. (R. 216.) As further evidence of the importance that is attached to the case, two agency groups, The National Association of Life Underwriters, and The Wisconsin Association of Life Underwriters, filed an *amicus* brief in the court below in support of the Wisconsin statute.

In an *amicus* brief filed by the Church Fire Insurance Corporation and the Catholic Relief Insurance Company of America in the case of *State Board of Insurance v. Todd Shipyards Corp., supra,* it was asserted that if the Texas statute then under consideration were sustained, other states could be expected quickly to exercise similar taxing and regulatory powers. This was recognized in this Court's opinion in the *Todd* case, in the following language (370 U. S. at 457):

> "But the policy announced by Congress in the McCarran-Ferguson Act was one on which the industry had reason to rely since 1897, when the *Allgeyer* decision was announced; and we are advised by an *amicus* brief how severe the impact would be on small insurance companies should the old rule be changed. When, therefore, Congress has posited a regime of state regulation on the continuing validity of specific prior decisions

(see *Federal Trade Comm'n v. Travelers Health Assn.*, 362 U. S. 293, 301-302), we should be loath to change them."

The consequences would fall particularly heavily on the small direct mail insurance companies. These companies, of which Ministers is one, like Church Fire Insurance Corporation and Catholic Relief Insurance Company, would find it difficult to support the heavy burden of ascertaining and complying with the requirements of the states. They are not licensed and would effectively be precluded from writing insurance in many of those states. Assessment companies, such as the Commercial Travelers Mutual Accident Association of Utica, an assessment company organized under the laws of New York and taxed and regulated by that state, could not qualify in many states where they now have a substantial membership, since these states do not authorize the conduct of insurance on the assessment basis. (R. 223.) Even the larger insurance companies would be significantly hampered in being required to comply with the laws of all of the states with which any given insurance transaction might have any connection.

While this suit was pending before the Wisconsin Supreme Court, three cases arose in California with respect to the application of the California statute to companies selling insurance by mail to California residents. While those cases did not involve new legislation, as here, the trial court held, on the authority of *Todd Shipyards* and other cases, that California could not constitutionally regulate an insurance transaction entered into by the use of the United States mails with a foreign non-licensed insurance company. On September 14, 1966 the California

District Court of Appeals, expressly following the decision of the Wisconsin Supreme Court in this case, reversed.[3] We are advised that an appeal to the California Supreme Court is contemplated.

CONCLUSION

A substantial industry, providing a useful and economic service to thousands of customers, developed in reliance on the system of regulation which was worked out by this Court. In returning insurance regulations to the States, Congress clearly adopted this system of regulation. A change as fundamental as that involved in this case is clearly a matter of importance, both in terms of economics, and in terms of the Constitutional law of this country. The decision below represents a major break in Constitutional doctrine relating to the field of insurance, and should be reviewed by this Court. Probable jurisdiction should be noted, and the judgment below from which this appeal is taken should be reversed.

Respectfully submitted,

ERWIN N. GRISWOLD

Counsel for Appellant

FRANK A. ROSS

Of Counsel

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[3]**People v. United National Life Insurance Company**, Civ. No. 30330; **People v. Pioneer Life Insurance Company**, Civ. No. 30331; **People v. National Liberty Life Insurance Company**, Civ. No. 30332; all decided September 14, 1966.

APPENDIX A

APPEAL from a judgment of the circuit court for Dane county: NORRIS E. MALONEY, Circuit Judge. *Affirmed.*

This is a test suit for a declaratory judgment brought by Ministers Life & Casualty Union (Ministers), a foreign mail-order insurance company not licensed to do business in Wisconsin. The litigation, although brought by Ministers, is financed by three trade associations and was tried on an agreed statement of facts supplemented by testimony. Ministers contends sec. 201.42, Stats., excepting the provisions dealing with substituted service of process, is invalid and unconstitutional and thus not applicable to it and other unlicensed mail-order insurance companies. From a judgment holding the section constitutional and applicable to Ministers' mode of doing business in Wisconsin, it appeals.

For the appellant there were briefs by *Ross, Stevens, Pick & Spohn,* attorneys, and *Frank A. Ross, Sr.,* of counsel, all of Madison, and oral argument by *Frank A. Ross, Sr.*

For the respondents the cause was argued by *E. Weston Wood* and *Harold H. Persons,* assistant attorneys general, with whom on the brief was *Bronson C. La Follette,* attorney general.

Briefs *amici curiae* were filed by *Laikin, Swietlik & Peltin,* attorneys, and *George J. Laikin* of counsel, all of Milwaukee, for the National Association of Life Underwriters and the Wisconsin Association of Life Underwriters.

HALLOWS, J. The challenged sec. 201.42, Stats., entitled "Unauthorized Insurance" was created by ch. 397, Laws of 1961, and purports by its terms to apply to the mail-order insurance business and to be a comprehensive regulating and taxing law[1] of the doing of insurance busi-

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[1]Summary of sec. 201.42, Stats. (provisions pertinent to this appeal):

(2) (a) An insurance business is defined as being any of enumerated acts in this state effected by mail or otherwise and the venue of an act committed by mail "is at the point where the matter transmitted by mail is delivered or takes effect." Among the acts listed are: "1. The making of or proposing to make, as an insurer, an insurance contract. . . . 3. The taking or receiving of any application for insurance. 4. The receiving or collection of any premium, commission, membership fees, assessments, dues or other consideration for any insurance or any part thereof. 5. The issuance or delivery of contracts of insurance to residents of this state or to persons authorized to do business in this state. . . .

"(b) . . . 3. Transactions in this state involving a policy lawfully solicited, written, and delivered outside of this state covering only subjects of insurance not resident, located, or expressly to be performed in this state" are exempted as well as other transactions not material to this appeal.

(3) Insurance as defined in the act is prohibited unless authorized.

Service of process on the commissioner is provided by sub. (4) and such service on the secretary of state in sub. (5).

Subs. (6), (7), (8), and (13) impose fines, penalties, and other sanctions against an unauthorized insured. For instance, in sub. (6) before an unauthorized insurer may file a pleading in a court action or administrative proceeding, he must provide a bond and procure proper authorization to do business in the state.

(8) Contracts of insurance made by unauthorized insurers are unenforceable by such insurer. Any person who assisted in the procurement of unauthorized insurance is liable to the insured as a guarantor of the contract.

(9) This subsection is directed at persons who are insured by an unauthorized insurer by requiring them to produce their contracts and disclose information about such transactions with sanctions for failure to do so.

(10) The reporting of unauthorized insurance by persons investigating or adjusting any loss of any such unauthorized insurance is required.

(11) A three per cent tax is levied on premiums of unauthorized insurance done in this state by unauthorized insurers. This tax is one per cent more than the two per cent tax levied upon licensed insurers.

(12) A secondary liability is imposed upon the insured who is also subject to primary liability for the payment of a premium tax in the case of independently procured insurance, with some exceptions.

(13) An unauthorized insurer is subject to a fine of not more than $5,000 and in addition to a forfeiture in the sum of $500 for the first offense and for each additional month during which the insurer continues to violate the statute.

ness in this state by a company which is not licensed to do business herein. In the purpose clause, the legislature declared as public policy its concern with "the protection of residents of this state against acts of persons and insurers not authorized to do an insurance business in this state by the maintenance of fair and honest insurance markets, by protecting the premium tax revenues of this state, by protecting authorized persons and insurers, which are subject to strict regulation, from unfair competition by unauthorized persons and insurers and by protecting against the evasion of the insurance regulatory laws of this state." The legislature expressly stated that in enacting the law it exercised its power to protect the residents of the state and to define what constitutes doing an insurance business in this state and also exercised the power and privilege available to it by virtue of Public Law 79-15 (1945) (Ch. 20, 1st Sess., S., 340), 59 Stat. 33, the McCarran Act.

Ministers was organized under the laws of Minnesota sixty-four years ago and is representative of that class of insurance companies which had their origin in the early Traveling Men's Associations which served a selective class of members principally on a direct-mail basis. It is now a mutual legal-reserve life company selling accident and health and life insurance policies to ministers and professional religious workers in the United States and Canada principally by direct mail even in those states in which it is licensed. It is licensed to do business in 10 states and in all but two provinces of Canada. It has agents in seven states and one province of Canada.

Wisconsin is a state in which Ministers is not licensed to do business, has no agents therein, and operates on a direct-mail basis. It issues four kinds of insurance policies, group life, individual life, franchised-group accident and health, and individual accident and health. It solicits business through advertisements in national publications and in church and other religious publications. Direct-mail solicitation and group leaders are also used extensively. General mailing is sent to between 60,000 and 140,000 eligible persons some six times a year and a special mailing to between 6,000 and 8,000 selected individuals approximately 12 times a year. In Wisconsin approximately 25,000 mail solicitations are made annually to approximately 3,600 residents. In the case of individual policies, upon receiving an inquiry at its home office in Minneapolis, Ministers mails an application to the prospect who fills it out and mails it back to Ministers. This application is usually accompanied by the first premium. The policy is prepared, signed, and mailed to the applicant from its home office. Under its articles of incorporation, a person becomes a member of Ministers upon delivery and acceptance of the policy and the applicant is given an opportunity to examine the policy upon its receipt; if unsatisfactory, he may reject it and mail it back and his premium will be refunded. All the mailing of notices of premium and other mailing is done at the home office of Ministers and all premiums are payable and received there.

If, in this process of mail-order selling, Ministers needs additional information for underwriting purposes, it obtains it through correspondence with the applicants or from local doctors or by employing national investigatory

agencies. For medical information Ministers may use the family physician by mailing a medical-report form to him requesting that he fill it out and return it to the home office. The doctor is paid by Ministers for such services. Physical examinations when required are made by the family physician and occasionally by some other doctor selected by Ministers. All contacts between Ministers and the doctor are by mail and the cost of the medical examination is paid by Ministers. If other local investigation is required, Ministers uses national investigatory agencies either on a basic-charge basis or upon agreed-hourly charge or some other specially-arranged charge. Claims for accidental death, for disability under accident and health policies and for death which occurs during the contestable period of a life policy are generally investigated. While these national agencies have no power to negotiate or settle claims, they do make the necessary investigation and report to Ministers.

Ministers pays claims from its home office on proof-of-claim forms furnished to the claimant or which are generally attached to the policy when issued. Further claim forms, if needed, are sent to the claimant who furnishes such other data and certification and reports as may be necessary.

In selling group-life and group-franchise accident and health insurance a slightly different procedure is followed. A group leader is selected by the group and he negotiates with Ministers by mail for the group policy. In the case of group life, Ministers sends to the group leader its literature and appropriate forms. The group leader undertakes

to enroll the individual members of the group on enrollment cards which are sent to Ministers. A master policy for a group is issued and individual members receive a certficate of insurance. A premium notice for the group is sent to the group leader who collects and remits the premiums. However, in the case of a group-franchise accident and health policy each member of the group makes his own application and receives an individual policy direct from Ministers and premium notices after the first premium are mailed directly to the individual member. The activities of the group leader in this latter form of selling are to initiate the original application and the initial premium and to get the group started. No group leader is compensated by fee nor are expenses reimbursed by Ministers, nor does he handle any claims on the group policy.

Ministers has no office, officer, bank account or real estate in Wisconsin. It does own some mortgages secured by Wisconsin real estate. Approximately one-third of the policies held by residents of Wisconsin were issued while such persons were residents of other states.

The business done by Ministers is not insignificant; although compared with large stock companies, it would hardly be considered impressive. As of August 1, 1962, Ministers had in force in the state 626 individual-life policies with approximately $2,000,000 insurance in force, 1,842 individual accident and health policies, two group-life policies covering about 85 individuals, and six franchise-group accident and health policies covering about 350 individuals. In the period from 1955 when Ministers wrote premiums totaling $83,516, it has grown so that in 1961 it wrote premiums of $208,240.

This case does not involve sporadic sales of insurance but a continuous and systematic course of business conduct and the question is whether this conduct or activity is of such a quality and nature and so related to the purpose of the regulation and bears such relationship to Wisconsin in respect to the state's interest in such activity and the subject of the insurance that this state may regulate and tax it. Phrased in traditional conceptual language of "presence in the state," is Ministers "doing business" in the state of Wisconsin for the purpose of regulating that business?

Ministers contends the state of Wisconsin has no jurisdiction to tax or regulate its mail-order insurance business by sec. 201.42, Stats., because that section violates (1) the commerce and the supremacy clauses, (2) the due-process clause, (3) the contract clause, and (4) the postal clause of the United States constitution.

We do not agree and expressly hold the state of Wisconsin has jurisdiction to enact an insurance regulatory and taxing statute such as sec. 201.42, Stats. The insurance business from its very inception has been so permeated with public interest and with the need for regulation that it has been considered the proper object of regulation by the state. As early as 1869 the supreme court held in *Paul v. Virginia*, 75 U. S. (8 Wall.) 168, 19 L. Ed. 357, that the fire-insurance business although properly subject to local regulation was not interstate commerce and thus subject to federal regulation. In reliance upon that case and many subsequent cases which enlarged the doctrine

to include other phases of insurance,[2] the states enacted a variegated mass or network of insurance regulations. However, in 1944 in *United States v. South-Eastern Underwriters Asso.* [SEUA], 322 U. S. 533, 64 Sup. Ct. 1162, 88 L. Ed. 1440, the supreme court held the modern business of insurance was interstate commerce and thus subject to regulation by Congress under the commerce clause. That decision seriously affected state regulation and upon the urging of the insurance industry, Congress responded the following year with the passage of the McCarran Act, 59 Stat. 33, ch. 20, 15 USC, secs. 1011-1015 (1964 ed.). This act left to the states the regulation and taxation of insurance, stating such continual regulation was in the public interest and that silence on the part of Congress should not be construed to impose any barrier to state regulation or taxation.[3]

By virtue of the McCarran Act as construed in *State Board of Ins. v. Todd Shipyards Corp.* (1962), 370 U. S. 451, 82 Sup. Ct. 1380, 8 L. Ed. (2d) 620, Ministers claims the states were granted only a limited power to regulate and tax insurance companies or at least the constitutional

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[2]**National Union Fire Ins. Co. v. Wanberg** (1922), 260 U. S. 71, 43 Sup. Ct. 32, 67 L. Ed. 136 (hail insurance); **Northwestern Mutual Life Ins. Co. v. Wisconsin** (1918), 247 U. S. 132, 38 Sup. Ct. 444, 62 L. Ed. 1025 (life insurance); **New York Life Ins. Co. v. Deer Lodge County** (1913), 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. 332 (life insurance); **Nutting v. Massachusetts** (1902), 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324 (marine insurance); **Hooper v. California** (1895), 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297 (marine insurance); **Bothwell v. Buckbee, Mears Co.** (1927), 275 U. S. 274, 48 Sup. Ct. 124, 72 L. Ed. 277 (strike insurance).

[3]The act also provided the business of insurance and every person engaged therein was subject to the laws of the several states which related to regulation or taxation of such business and no act of Congress was to be construed as invalidating any state law for such purpose unless such acts specifically related to the business of insurance. Provision was then made for the application of the Sherman Act, Clayton Act and Federal Trade Commission Act.

standard of due process as applied to a state's jurisdiction to regulate insurance as established in the pre-SEUA decisions of the supreme court was frozen, thus substituting for a flexible and developing constitutional standard of due process a more fixed and rigid statutory standard. Thus it is claimed, because sec. 201.42, Stats., in effect prohibits the doing of a mail-order insurance business with Wisconsin residents, that it exceeds this limited grant of power, not because it violates the due-process clause but because it violates the commerce and supremacy clauses.

The lower court rejected this reasoning and held the commerce clause was not involved, at least not in the traditional sense that it was violated. Whether the power of a state to regulate and tax the doing of an insurance business is phrased in the language of a limited power granted under the commerce clause by the enactment of the McCarran Act or whether we view the state's power as being limited by a dated application of the due-process clause makes no practical difference in the result of this case. Such a dispute between the parties seems to be "a rose by any other name."

However, it would seem the McCarran Act did not, in common parlance, grant the states any power but left them with the indigenous power they then possessed unaffected by reason of the commerce clause excepting to the extent provided in the act and the disclaimer of the "unilluminated silence" rule. It has been said the act merely render unto Caesar the things which belong to Caesar. *North Little Rock Transportation Co., Inc., v. Casualty Reciprocal Royal Exchange* (1949), 85 Fed. Supp. 961, 964.

The validity of the McCarran Act was sustained in *Prudential Ins. Co. v. Benjamin* (1946), 328 U. S. 408, 66 Sup. Ct. 1142, 90 L. Ed. 1342, which dealt with the validity of a South Carolina statute imposing on foreign insurance companies as a condition of their doing business within that state an annual three per cent tax on premiums from business done within the state without reference to the character of the transactions as interstate or local. The statute was held valid and the court observed that Congress in passing the McCarran Act had "put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause. . . ."

The precise nature and extent of a state's power to regulate insurance was again examined in *State Board of Ins. v. Todd Shipyards Corp., supra,* which is relied upon by Ministers for its theory that the state's jurisdiction to regulate was in effect put in a deep freeze and confined to cases decided prior to SEUA. We think the outer limits of the vital and ever-growing standards of due process were defined in *Todd* to be the holdings in a trilogy of cases, but we do not read *Todd* as freezing state regulation to the type then extant and as forever barring within these outer limits the expansion of the regulation of the insurance industry by states to meet the evergrowing social needs and problems of modern civilization. The so-called contact concept of due process in relation to the state's jurisdiction to tax and regulate the "doing of insurance business" within its borders may be applicable to new facts within the outer limits decided factually by *Allgeyer v. Louisiana* (1897), 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; *St. Louis Cotton Compress Co. v. Arkansas* (1922), 260 U. S. 346, 43 Sup.

Ct. 125, 67 L. Ed. 297; and *Connecticut General Life Ins. Co. v. Johnson* (1938), 303 U. S. 77, 58 Sup. Ct. 436, 82 L. Ed. 673.

In *Allgeyer,* the court held unconstitutional under the due-process clause a Louisiana statute which imposed a fine upon anyone who effected insurance on property in Louisiana with an insurance company not licensed in Louisiana. The defendant contracted in New York with an insurer not licensed in Louisiana for a marine policy covering shipments of cotton to be made from Louisiana. The only thing done in Louisiana was the mailing of a letter in reference to the shipment. No solicitation was made, no claims investigated or settled or any other activity by the insurer within the state by mail or otherwise. In its approach to the problem, the court considered the location of the making of the insurance contract as the significant event in the insurance business. In the *Cotton Compress Case,* the cotton compress company, a Missouri corporation but licensed in Arkansas, obtained a fire policy in Missouri covering its property in Arkansas from an insurer not licensed in Arkansas. The statute of Arkansas imposes a five per cent premium tax paid on insurers not licensed to do business in the state, while the rate for authorized companies was two per cent. On the basis that no act was done within the state and a state may not regulate activities beyond its borders, the statute was held unconstitutional. On the same grounds, *Connecticut General* held unconstitutional a California statute taxing premiums paid by an insurer licensed in that state to a foreign corporation also licensed in that state on reinsurance of policies insuring lives of California residents. Reinsur-

ance contracts were made and premiums and losses paid in Connecticut.

These three cases have the common element that the insurer involved carried on no activities within the taxing or regulating state either by mail, by agents, by independent contractors, or otherwise, in connection with the insurance transaction involved. All the activities to produce the policy and to service it took place wholly outside the state seeking to impose the tax. Significantly, the only contact was the location of the risk within the state which standing alone was not sufficient for jurisdiction.

In *Todd,* the court had before it a Texas statute requiring the payment of five per cent gross-premium tax upon any person who purchased from an insurer not licensed in Texas a policy covering risks within the state unless the policy was purchased through an agent licensed in Texas. Todd, the insured, was a New York corporation which operated shipyards in various states including Texas and was licensed to do business in Texas. It negotiated an insurance policy in New York with brokers for two English insurers, insuring primarily its property in Texas against loss and its liability for damage to property of others. The policy was issued in New York and accepted there by Todd. All premiums and losses were paid in New York. The insurers were not licensed in Texas, had no place of business or any agent there and did not investigate the risks or claims there. It made no solicitation of any kind in Texas. Adjustments of losses were carried on in New York. The only connection between Texas and the insurance transaction was the fact the property covered by the insurance was located in Texas.

Because the facts in *Todd* were so similar to the facts in the *Allgeyer, Cotton Compress* and *Connecticut General Cases,* the supreme court was asked to re-examine the validity of the trilogy and to adopt the approach of *Osborn v. Ozlin* (1940), 310 U. S. 53, 60 Sup. Ct. 758, 84 L. Ed. 1074, and *Hoopeston Canning Co. v. Cullen* (1943), 318 U. S. 313, 63 Sup. Ct. 602, 87 L. Ed. 777. The philosophy of these two cases within the framework of the due-process limitation considers as a whole all aspects of the insurance transaction having contact with the state and the relationship of the regulation involved to the state's interest in those aspects. In this posture the supreme court refused to re-examine the validity of the three older cases, stating the policy announced by Congress in the McCarran Act was one which the industry had reason upon which to rely since the *Allgeyer* decision in 1897. Then in picturesque language, the court stated, "Congress tailored the new regulations for the insurance business with specific reference to our prior decisions. Since these earlier decisions are part of the arch on which the new structure rests, we refrain from disturbing them lest we change the design that Congress fashioned."

If we read *Todd* correctly, it held *Allgeyer, St. Louis Cotton Compress* and *Connecticut General* were not to be re-examined and overruled but constitute the outer limits within which the doctrine of due process must be confined. *Todd* does not hold any static or conceptualistic theory of "doing business" as the jurisdictional basis for state regulation, nor did it overrule the *Osborn* and *Hoopeston* decisions or approach. It might well have reached the

same result on the facts, applying the *Osborn-Hoopeston* philosophy.[4]

These two cases are also a part of the pre-SEUA cases and more so in respect to regulation than *Minnesota Commercial Men's Asso. v. Benn* (1923), 261 U. S. 140, 43 Sup. Ct. 293, 67 L. Ed. 573, which is relied upon by Ministers.

Benn, which was not mentioned in *Todd*, involved an unlicensed foreign corporation doing an insurance business by mail within the state of Montana whose law subjected such insurers to service of process. The court held the law unconstitutional and Ministers argues the case is controlling here because if a state in 1923 had no jurisdiction over a mail-order insurance company for service of process *a fortiori*, a state would have no jurisdiction for taxation or regulation, since the contacts between the state and the object regulated must be more substantial to regulate or tax than in service-of-process cases to satisfy due process. We do not think the McCarran Act even as interpreted by *Todd* solidified the state's jurisdiction to regulate or tax insurance business by such an analogy to *Benn*. This view has been taken by the trial court of the county of Los Angeles, California, *People of the State of California v. National Liberty Life Ins. Co.*, Case No. 865,425, (Dec. 23, 1965). That decision is not persuasive or controlling upon us. Nor do we agree that because no case presented itself prior to the McCarran Act for the application of the *Osborn-Hoopeston* approach to the regulation or

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[4]This view was taken in the **amicus curiae** brief of Cloyd La Porte filed in **Todd** on behalf of the Church Fire Ins. Corp. and the Catholic Relief Ins. Co. of America and referred to in the **Todd** decision. This brief was made a part of the record in this case.

tax of a mail-order insurance business, such as is presented here, that by inference or otherwise *Todd* decided such approach was not applicable to mail-order insurance business.

Benn's "presence concept" of doing business may be conceded to no longer have vitality in the field of jurisdiction for service of process in view of *International Shoe Co. v. Washington* (1945), 326 U. S. 310, 66 Sup. Ct. 154, 98 L. Ed. 95, whose minimum-contact theory of jurisdiction was proclaimed only a few years after the decision in *Osborn* and *Hoopeston* in the related field of states' jurisdiction to tax and regulate. In fact, *Travelers Health Asso. v. Virginia* (1950), 339 U. S. 643, 648, 70 Sup. Ct. 927, 94 L. Ed. 1154, in reference to an argument that *Benn* was controlling, said, quoting *Hoopeston*, "we rejected the contention, based on the *Benn* case among others, that a state's power to regulate must be determined by a 'conceptualistic discussion of theories of the place of contracting or of performance.' Instead we accorded 'great weight' to the 'consequences' of the contractual obligations in the state where the insured resided and the 'degree of interest' that state had in seeing that those obligations were faithfully carried out." In a concurring opinion Mr. Justice DOUGLAS, who authored *Todd*, pointed out it was the nature of the state action which determined the kind and degree of activity in the state necessary to satisfy the requirements of due process.

We think *Osborn* and *Hoopeston* are sufficient authority for Wisconsin's jurisdiction to regulate the type of insurance business presented by the instant facts and represent the prevailing view of the jurisdiction to tax and

regulate an insurance business within the limits of due process. In *Osborn* the court justified a Virginia statute which prohibited insurers licensed in Virginia from making contracts of insurance on persons or property in the state except through licensed resident agents who were to countersign such policies and receive at least one half of the customary commission. As here, the claim was made the state's statute sought to intrude upon business transactions beyond its borders. The court denied such contention, stating Virginia's "interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed." The court thought Virginia had a definable interest in that which she sought to regulate and distinguished the *Allgeyer* and *Cotton Compress Cases*. The *Osborn* decision was not predicated upon the fact the insurance companies to which the law applied were licensed to do business in Virginia or upon the place of contracting but principally upon the power of the state to regulate a business affecting a matter of great public interest and concern to the state. Ministers' distinction of this case, based upon *Compania de Tabacos v. Collector* (1927), 275 U. S. 87, 48 Sup. Ct. 100, 72 L. Ed. 177, and *Equitable Life Assurance Society v. Pennsylvania* (1915), 238 U. S. 143, 35 Sup. Ct. 829, 59 L. Ed. 1239, and other cases, is in our view without merit. It is true, public interest alone is not sufficient to give a state jurisdiction, but great concern and public interest do add significance to contacts which compose the organic whole and are directly related to the regulation and which might not otherwise be sufficient to meet the standard of the due-process clause.

Hoopeston was decided a few years after *Osborn*. This case involved reciprocal-insurance associations whose attorney-in-fact was located in Illinois. The suit was brought by a reciprocal-insurance association to have declared unconstitutional a New York statute which prohibited reciprocal-insurance associations from doing business in New York unless licensed therein. In this case, a canner in New York signed an application, sent it to the attorney-in-fact in Chicago. If the canner was accepted for membership he would sign a power-of-attorney and forward it to the attorney-in-fact. Sometimes an insurance engineer investigated the risk and in some instances he might service the policy. Under the standard fire policy, the option to rebuild and repair the damaged property was reserved. Losses were paid by check from Illinois. In sustaining the statute, the court took the view that in determining the power of a state to regulate the doing of insurance business in the state the earlier conceptualistic theories of the place of contracting or of performance to determine the "presence" of the business which Ministers relies upon here, were no longer of importance. *Hoopeston* recognized a state may have substantial interests in the business of insuring its people and property which may be measured by the need for the protection of its citizens by the regulation of the industry.

Significantly, the court viewed the actual physical signing of the contracts as only one element in the broad range of the business activities, and while important, it was "an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." The court real-

istically stated that in the insurance business, a transaction neither begins nor ends with the execution of the contract. Under *Hoopeston's* philosophy and approach "in determining whether insurance business is done within a state for the purpose of deciding whether a state has power to regulate the business, considerations of the location of the activity prior to and subsequent to the making of the contract, *Osborn v. Ozlin, supra,* of the degree of interest of the regulating state in the object insured, and of the location of the property insured are separately and collectively of great weight."

While the facts in the instant case may not be as strong as the facts in *Hoopeston,* the contacts with Wisconsin are measurably more than found in the *Todd* type of case. Here, we have a systematic solicitation of insurance by mail, not sporadic but continuous, and in addition, group leader's solicitations. We need not consider group leaders as agents but even Ministers should admit they are significant contacts which were encouraged to work for Ministers' benefit and which were relied upon as a method of doing business. Besides, Ministers utilizes the necessary services of investigatory agencies and doctors in the state for underwriting and claim-settlement purposes, carefully avoiding designating them agents but securing the same results. Ministers has "realistically entered the state looking for and obtaining business." It is not essential that the issuance of the policy be done in Wisconsin to "exploit the consumer market." For pre-SEUA cases on what constitutes doing business within the state by foreign insurance corporations, see Anno. 137 A. L. R. 1128. The activities essential to the conduct of this insurance business, both

prior to and subsequent to the making of the contract and which are part of the organic whole, take place in Wisconsin and, in addition, the subjects of the insurance are in this state. In common parlance and in any enlightened sense, it cannot be said that Ministers does not do business in Wisconsin.

This court has adopted the modern contact concept of jurisdiction in service-of-process cases. *Prime Mfg. Co. v. Kelly* (1958), 3 Wis. (2d) 156, 87 N. W. (2d) 788; *Bond v. Harrel* (1961), 13 Wis. (2d) 369, 108 N. W. (2d) 552, 98 A. L. R. (2d) 330. See also *Pavalon v. Fishman* (1966), 30 Wis. (2d) 228, 140 N. W. (2d) 263; *Travelers Ins. Co. v. McArthur & Sons* (1964), 25 Wis. (2d) 197, 130 N. W. (2d) 852. We have also adopted the contact theory of doing business to jurisdiction to tax. *Moore Motor Freight Lines v. Department of Taxation* (1961), 14 Wis. (2d) 377, 111 N. W. (2d) 148. Recently we adopted this approach in the area of conflict of laws. *Wilcox v. Wilcox* (1965), 26 Wis. (2d) 617, 133 N. W. (2d) 408.

Ministers relies on *American Oil Co. v. Neill* (1965), 380 U. S. 451, 85 Sup. Ct. 1130, 14 L. Ed. (2d) 1, and cases of that type for the proposition that aside from its theory the McCarran Act froze the due-process concept, the due-process clause forbids the enactment of sec. 201.42, Stats. The application of the contact concept of jurisdiction to regulate or tax cannot be measured by a mathematical or quantitative rule. Other cases are helpful but generally not controlling or are dispositive, and in such class falls the cases cited by Ministers. Likewise, we refrain from citing cases sustaining regulation or taxing statutes of other types of businesses. For a review and analysis of the prob-

lem, see 2 Couch, Insurance (2d ed.), ch. 21, p. 431, Regulation and taxation of insurers; Anno. Insurance-State Taxation or Regulation, 164 A. L. R. 500.

The impact of this section on Ministers is not so serious as to violate the due-process standard. The inconvenience and the change in its mode of business are arguments properly made to the legislature but in this case hardly render the section unconstitutional. While it is conceded the premium tax is modest and not burdensome, it is claimed the regulatory parts prohibit assessment policies, require the issuance of policies by resident licensed agents, require financial reports different from other states, and regulate the form of policies. Obviously, any necessary regulation substantial enough to protect the citizens of a state will cause inconvenience and adjustments in the insurance business. Uniform policies, uniform forms of financial reports and issuance of policies by licensed agents are not unreasonable. Financial requirements to insure the solvency of the insurer are common and necessary in insurance regulation. True, Wisconsin regulation may have some repercussions beyond its borders and may run counter to Ministers' economic theories of doing business but these are of no judicial significance. We cannot find merit in its argument that although Wisconsin's regulations alone may not be a prohibitive burden, such regulations will be burdensome if the pattern of its legislation is adopted by other states.

We need not dwell on the degree of interest and concern Wisconsin has in the regulation of insurance and particularly the regulation under inquiry. Its grasp has not exceeded its reach of legitimate interest in the regulation

of mail-order insurance insuring the life and health of its residents in the manner in which Ministers conducts its business. No claim is made the methods adopted are not germane to the objects of the legislation; the claim is only, "You can't do this to me." We do not hold, however, that any one single act defined as doing business in the state in sec. 201.42, Stats., is alone sufficient for the application of the section to a given business. Each set of facts must be considered on its own merits when applying the statute.

It is contended by Ministers, sec. 201.42, Stats., violates the contract clause, sec. 10, art I, United States constitution, and sec. 12, art. I, Wisconsin constitution, because by sub. (8) it prevents Ministers from carrying out its obligation to renew those of its policies which contain guaranteed renewal clauses. Sub. (8) provides any contract of insurance entered into by an unauthorized insurer is unenforceable by the insurer. Ministers claims approximately one third of its policies were written outside of the state when the members were nonresidents of Wisconsin. As to such contracts, sub. (2) (b) 3 exempts such policies from the unenforceability prescribed by sub. (8). In respect to contracts made with Wisconsin residents, the trial court held the policies were void and thus this section would not impair any of their obligations. It relied on *Presbyterian Ministers' Fund v. Thomas* (1905), 126 Wis. 281, 105 N. W. 801, but that case held an insurance contract made in Pennsylvania with a Wisconsin resident under the then statute to be unenforceable, not void. Presumably some of Ministers' policies insuring Wisconsin residents were written on a guaranteed renewal basis. How-

ever, the facts do not disclose any particular policies or the particular facts of their issuance.

In the stipulation of facts, it is stated that while some of the accident and health policies and all of the accident policies confer upon Ministers the right to refuse to renew, it is certified to its members that for many years it has followed a policy not to cancel or refuse to renew accident and sickness insurance because the member has become a poor-insurance risk. The president of Ministers testified that if sec. 201.42, Stats., were valid and if Ministers could not obtain a license, it would have to terminate a large number of policies which it felt it was under a moral obligation to continue. This falls short of an obligation of contract. If Ministers is unable to qualify or refuses to qualify, we do not see how that nonaction could constitute an impairment of contract by sec. 201.42. At most, this section perpetuates former statutes making insurance issued by unlicensed insurers unenforceable in this state by those insurers. Such contracts as Ministers may have with guaranteed-renewal options by the insured were made in light of such statutes and therefore it cannot be claimed that sub. (8) of the statute is a law which impairs the obligation of the contracts.

As a criminal statute, sec. 201.42, Stats., is also challenged under the due-process clause because it fails to meet standards of specificity and clarity and it punishes acts committed beyond the state border. Not every indefiniteness or vagueness is fatal to a criminal statute or a statute such as sec. 201.42 prescribing criminal sanctions. A fair degree of definiteness is all that is required.

It is sufficient if the standard of guilt is reasonably ascertainable by men of common intelligence without guessing at its meaning. *Winters v. New York* (1948), 333 U. S. 507, 68 Sup. Ct. 665, 92 L. Ed. 840; *State v. Evjue* (1948), 253 Wis. 146, 33 N. W. (2d) 305. At the most, Ministers suggests marginal cases of interpretation and these are not sufficient to render the statute vague. *United States v. Harriss* (1954), 347 U. S. 612, 74 Sup. Ct. 808, 98 L. Ed. 989. It is clear from the language of the section that it applies to Ministers' method of operation; no reasonable person could doubt such application.

Relying on *Hotzel v. Simmons* (1951), 258 Wis. 234, 45 N. W. (2d) 683, for the proposition that Wisconsin has no constitutional power to punish an act not done within its borders, Ministers argues the section is invalid for that reason. This argument is based on the concept that Ministers is doing business outside but not in the state of Wisconsin and must fail for the reasons hereinbefore discussed. Furthermore, any inability of Wisconsin to enforce its criminal laws directly on persons who are outside the state does not affect the validity of the law and is no argument for its invalidity.

Ministers' final attack on the statute as a violation of the postal clause, sec. 8, art. I, United States constitution, is without merit. The Wisconsin section does not interfere with the use of the mail, does not prohibit Ministers from using the mail and more importantly does not interfere with Congress' exclusive power to determine what shall be carried and what shall be excluded in the mails. The postal clause is not talismanic and does not immunize Ministers from regulation.

By the Court.—The judgment declaring sec. 201.42, Stats., constitutional and applicable to the plaintiff in its insurance business with residents of Wisconsin and requiring the plaintiff to comply with its provisions is affirmed.

GORDON, J. *(dissenting).* I must respectfully dissent. In *State Board of Ins. v. Todd Shipyards Corp.* (1962), 370 U. S. 451, 82 Sup. Ct. 1380, 8 L. Ed. (2d) 620, it was held that the McCarran Act restored to the states those regulatory powers over the insurance business which the states possessed prior to *United States v. South-Eastern Underwriters Asso.* (1944), 322 U. S. 533, 64 Sup. Ct. 1162, 88 L. Ed. 1440. In other words, the McCarran Act was construed as having made only a limited grant of power to the states. The extent of that limitation is to be found in the *Todd Case.* At page 455 of the decision in the *Todd Case,* the court stated:

> "For we have in the history of the McCarran-Ferguson Act an explicit, unequivocal statement that the Act was so designed as not to displace those three decisions. The House Report stated:
>
> "'It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association case.* Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *All-*

geyer v. Louisiana (165 U. S. 578), *St. Louis Cotton Compress Co. v. Arkansas* (260 U. S. 346), and *Connecticut General Life Ins. Co. v. Johnson* (303 U. S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.' HR Rep No. 143, 79th Cong., 1st Sess., p. 3.

"Senator McCarran, after reading the foregoing part of the House Report during the Senate debate, stated, '. . . we give to the States no more powers than those they previously had, and we take none from them.' 91 Cong. Rec. 1442."

It will be noted from the foregoing that the House Report described the three cases of *Allgeyer, St. Louis Cotton* and *Connecticut General Life* only as *examples* of the limitations which would apply; it is quite clear that the limitation upon state powers was not to be confined to those three decisions.

In addition to the limitation of the three recited cases, there is applicable, as a result of the *Todd Case,* the constitutional restriction implicit in *Minnesota Commercial Men's Assn. v. Benn* (1923), 261 U. S. 140, 43 Sup. Ct. 293, 67 L. Ed. 573. The *Benn Case* related to the service of process rather than to state regulation. The effect of the *Benn Case* on the question of the service of process has been changed by subsequent decisions; nevertheless, at the time of the *Todd Case* the concept of the *Benn Case* was incorporated into the interpretation of the McCarran Act, and this has not been changed.

Accordingly, it is my opinion that the regulatory powers of the state of Wisconsin cannot apply to the type of operation that is engaged in by Ministers Life & Casualty Union; the latter's method of doing business is strikingly similar to that which was employed by the Minnesota Commercial Men's Association in the *Benn Case.*

Wisconsin's interest in regulating the insurance sold to its citizenry does not enable the courts of Wisconsin to surmount the commerce clause or the supremacy clause. Unless the McCarran Act can be found to have returned regulatory power to the states in this type of case, the insurance business of Ministers Life is in interstate commerce pursuant to the *South-Eastern Underwriters Case.* I believe that *Todd* and *Benn* demonstrate that the McCarran Act did not give the states the power which the majority opinion utilizes to sustain the constitutionality of sec. 201.42, Stats.

MEMORANDUM OPINION OF CIRCUIT COURT FOR DANE COUNTY, WISCONSIN
(Formal Parts Omitted)

This is a test case for Declaratory Judgment financed by three trade associations who selected the plaintiff and action was commenced on August 1, 1962, and trial was postponed several times at plaintiff's request with final briefs being filed July 13, 1964.

The plaintiff, Ministers Life & Casualty Union, a reputable and economically and socially sound mutual insurance company operating generally on a mail-order basis, seeks

a judgment to declare that any mail-order insurance company, whether it be a profit organization or a mutual, reputable or disreputable, is entitled because of the Due Process Clause in the Federal Constitution to be exempt from regulation on mail-order business by any state in which it is not licensed as to policy forms, monetary reserves, or any other regulation other than the very limited "Guides For The Mail Order Insurance Industry" promulgated by the Federal Trade Commission July 14, 1964, which are designed generally only to prevent deceptive advertising; and to be exempt from any and all taxes on business written on the lives or health of persons while resident in states in which the mail-order insurance company is not licensed.

Plaintiff's argument is based upon one obscure clause in one sentence in Justice Douglas' opinion in the case of *State Board of Insurance, et al. v. Todd Shipyards Corp.* (1962), 370 U. S. 451, 82 S. Ct. 1380, 8 L. Ed. 620, reading as follows:

> "But the policy announced by Congress in the McCarran-Ferguson Act was one on which the industry had reason to rely since 1897, when the Allgeyer decision was announced; *and we are advised by an amicus brief how severe the impact would be on small insurance companies should the old rule be changed.* When, therefore, Congress has posited a regime of state regulation on the continuing validity of specific prior decisions (see *Federal Trade Com. v. Travelers Health Asso.*, 362 US 293, 301-302) we should be loath to change them." (Emphasis Supplied)

The case of *Allgeyer v. Louisiana* (1897), 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 382, held that when a marine

policy of insurance was negotiated and issued in New York, and the property shipped from Louisiana to France, whereupon a letter of notice of shipment was mailed from Louisiana from New York, that an attempt to regulate the insurance contract in Louisiana through a criminal statute was a violation of the Due Process Clause of the Federal Constitution because of the extra-territorial effect of the Louisiana Statute in attempting to prohibit the making of a contract in another state rather than to regulate insurance activities within the state.

Plaintiff deduces from the above-quoted language in the *Todd* case that whenever the U. S. mail is employed in the negotiation and issuance of an insurance policy, that any attempt by the State in which the insured or the insured property is located to regulate or tax said transaction is unconstitutional as being in violation of the Due Process Clause on the grounds that there are insufficient contacts between the foreign unlicensed insurance company to give the domiciliary state power to regulate or tax regardless of what contacts there were in addition to the transmission of the policy through the United States mail.

There are many reasons why this Court cannot adopt this fallacious reasoning. Firstly, it is not the function of this Court to speculate as to what the United States Supreme Court might do when this case reaches it, but rather the proper function is to determine what the Court did in the *Todd* case. *State Board of Insurance, et al. v. Todd Shipyards Corp.* (1962), 162 Tex. 8, 343, S. W. 2d 241.

Secondly, it is inconceivable that Justice Douglas intended to reverse and withdraw his concurring opinion

without even mentioning it by name, the case of *Travelers Health Assoc. v. Virginia* (1950), 339 U. S. 643, 70 S. Ct. 927, 94 L. Ed. 1154, 1164, in which the United States Supreme Court upheld the state of Virginia in ordering the Nebraska corporation to cease and desist from issuing and mailing insurance policies to Virginia residents which had been solicited through the medium of recommendations made by policyholders living in Virginia who were not compensated. In his concurring opinion Justice Douglas stated: "It is the nature of the state's action that determines the kind or degree of activity in the state necessary for satisfying the requirements of due process. * * * The wiles of the salesman have been many; the devices to avoid state regulation have been clever and calculated. * * * The history of the various methods used to evade state regulation is too recent to require extended comment. * * * This device for soliciting business in Virginia may be unconventional and unorthodox; but it operates functionally precisely as though appellant had formally designated the Virginia members (making the recommendation) as its agents. Through these people appellant has realistically entered the state, looking for and obtaining business. Whether such solicitation is isolated or continuous, it is activity which Virginia can regulate."

Plaintiff in this case similarly solicits some of its new business through group leaders located in Wisconsin who are not paid by plaintiff and whose compensation, if any, is paid by someone other than plaintiff.

Thirdly, the amicus curiae brief referred to in the above quotation from the *Todd* case has been stipulated to

be that of the Church Fire Insurance Corporation, which such brief at no point even remotely suggests the far-reaching conclusion argued for by plaintiff in this case. That amicus brief argued solely for what the Supreme Court did in the *Todd* case; namely, refused to reverse the Allgeyer case by extending the philosophy of the two more recent cases of *Osborn v. Ozlin* (1940), 310 U. S. 53, 60 S. Ct. 758, 84 L. Ed. 1074; *Hoopeston Canning Co. v. Cullen* (1943), 318 U. S. 313, 63 S. Ct. 602, 87 L. Ed. 777. In the *Todd* case the Court at great length differentiated the facts therein from the Osborn and Hoopeston Canning Company cases by pointing out that in the *Todd* case the only contact between the state of Texas and the contract of insurance was the mere fact that the buildings were located in Texas; the insurance contract was negotiated and executed in New York, claims were adjusted following an investigation of loss in Texas by an agent of the insured, and upon the basis of such investigation claims were adjusted in New York between the insured, a New York corporation, and the insurer and paid in New York. It was upon this differentiation that the questionable "vitality" of the Allgeyer decision was continued upon the basis of the House Committee Report in connection with the enactment of the McCarran Act, 59 Stat. 33, 15 U. S. sec. 1011, as a "part of the arch * * * that Congress fashioned."

The "vitality" of the Osborn and Hoopeston Canning Company cases (both of which were prior to the McCarran Act) was not even questioned to say nothing about plaintiff's contention that they were reversed in the *Todd* case, as well as the numerous cases subsequent to the McCarran

Act in which the Osborn and Hoopeston Canning Company cases were followed.

In the case of *Travelers Health Assoc. v. Virginia*, supra, the Osborn and Hoopeston Canning Company cases were approved in the following language:

> "But where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state. And in considering what constitutes 'doing business' sufficiently to justify regulation in the state where the effects of the 'business' are felt, the narrow grounds relied on by the Court (and the plaintiff in this case) in the Benn Case cannot be deemed controlling. (Parenthetical material supplied.)
>
> "In Osborn vs. Ozlin * * * we recognized that a state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the 'state action may have repercussions beyond state lines'. And in Hoopeston Canning Co. vs. Cullen * * *, we rejected the contention, based on the Benn Case among others, that a state's power to regulate must be determined by a 'conceptualistic discussion of theories of the place of contracting or of performance.' Instead we accorded 'great weight' to the 'consequences' of the contractual obligations in the state where the insured resided and the 'degree of interest' that state had in seeing that those obligations were faithfully carried out. And, in *International Shoe Co. vs. Washington*, 326 US 310, 316, 98 L. Ed. 95, 102, 66 S. Ct. 154, 161 ALR 1057, this Court, after reviewing past cases, concluded 'Due process requires only that in order to subject a de-

fendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." '."

In this day and age of intensified interest in accident and health as well as life insurance and the numerous welfare programs conducted at the expense of the State, there can be no doubt that the State has a vital interest in seeing to it that its residents are not deceived in the form of insurance contract entered into and that the insurance companies will be financially able to meet all of its obligations. The State has a deep interest, particularly in health and accident and life insurance, for the reason that in the event the insurance coverage is inadequate for any reason the State may very well have to pick up the tab under one of its numerous welfare programs.

As stated in Sec. 201.42 (1), 1961 Wis. Stats.: "Unauthorized Insurance. (1) Purpose. * * * The legislature declares that it is also concerned with the protection of residents of this state against acts by persons and insurers not authorized to do an insurance business in this state by the maintenance of fair and honest insurance markets, by protecting the premium tax revenues of this state, by protecting authorized persons and insurers, which are subject to strict regulation, from unfair competition by unauthorized persons and insurers and by protecting against the evasion of insurance regulatory laws of this state. * * *."

Wisconsin in the exercise of its sovereign power does not have to sit back and wait for the state of Minnesota

(where plaintiff is incorporated) to regulate the insurance business directly affecting not only the citizens of Wisconsin but the state of Wisconsin. If Wisconsin's sovereignty was so limited "* * *the result would be ultimately to force all of the states to accept the lowest standard for conducting the (insurance) business permitted by one of them or, perhaps, by foreign countries." *Robertson v. California* (1946), 328 U. S. 440, 66 S. Ct. 1160, 90 L. Ed. 1366, 1380. As a matter of fact the policy form issued by plaintiff to Wisconsin residents is not even subject to the approval of the state of Minnesota. Sec. 62.0015, Minnesota Stats.

As stated in *Federal Trade Com. v. Travelers Health Assoc.* (1960), 362 U. S. 293, 80 S. Ct. 717, 4 L. Ed. 724, at pp. 727, 729: "In our opinion the state regulation which Congress provided (in the McCaran Act) should operate to displace this federal (FTC) law means regulation by the State in which the deception is practiced and has its impact. * * * It is clear that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders." And "Suffice it to note that the impediments, contingencies, and doubts which constitutional limitations might create as to Nebraska's (Minnesota's) power to regulate any given aspect of extraterritorial activity (in Wisconsin) serve only to confirm the reading we have given to sec. 2 (b) of the (McCarran) Act."

The "contacts" of plaintiff with its 1,600 members in the state of Wisconsin are extensive, systematic and continuous, including the employment of agents for services

within Wisconsin such as doctors to make medical examinations within the scope directed by plaintiff and the investigation of claims, as well as insurability by independent agencies acting under the direction of plaintiff. Plaintiff's president conceded it could not operate in the life insurance field without medical examinations from doctors whose qualifications are determined by strict regulation by Wisconsin. The determination of whether a death is accidental or from natural causes not only requires investigation in Wisconsin by plaintiff's agents under its direction, *Meyers v. Mathews* (1955), 270 Wis. 453, 71 N. W. 2d 368, but in a large measure is dependent upon the service of the coroner and other Wisconsin public officials. Plaintiff, if licensed, would receive protection from unfair competition in the sharp practices of other mail order insurance companies about which plaintiff's president testified. These benefits from the state are sufficient quid pro quo, and nexus or contacts with Wisconsin to constitutionally sustain the normal 2% premium tax on plaintiff if licensed. *Moore Motor Freight Lines v. Dept. of Taxation* (1961), 14 Wis. 2d 377, 394-5, 111 N. W. 2d 148. The 3% tax for doing unauthorized insurance business is a proper means to force plaintiff to comply with Wisconsin licensing laws, and to require the insured to make sure that the tax on his unauthorized insurance is paid or pay it himself under penalty as prescribed in subsection (11) is a proper and practical way of enforcement just short of excluding unauthorized insurance altogether which the State would have the right to do. *Robertson v. California* (1946), 328 U. S. 440, 66 S. Ct. 1160, 90 L. Ed. 1366. It is insignificant that in this case the fulcrum of enforcement is the insured,

and in the *Robertson* case the fulcrum was the agent, but rather the test is that Wisconsin has the right to apply the pressure to the lever that will exclude insurance companies until they comply with the reasonable requirements of Wisconsin law as to monetary reserves, proper policy forms, and ethical conduct.

Plaintiff has two sources of obtaining new business: (1) Applications solicited by group leaders and (2) Applications solicited through the mailing of from 5,000 to 25,000 pieces of mail into the state of Wisconsin annually, in addition to advertisements in national religious magazines read by Wisconsin residents.

The plaintiff serves a very laudable purpose in providing health and accident and life insurance to persons engaged in religious activities at a low cost, but the Court is unimpressed by the generalized testimony to the effect that regulation and taxation by Wisconsin and other states in which plaintiff is unlicensed would "sound the death knell of mail-order insurance." Approximately one-half of plaintiff's business is done in states where it is licensed and has agents and the other half in unlicensed states such as Wisconsin. In the licensed states plaintiff now pays premium taxes ranging from 2% to 2½%, but even with such handicap of paying taxes on approximately half of its premium volume, plaintiff increased its surplus in a decade from 1952 to 1961 from $1,630,133.00 to $2,835,713.00.

As a matter of fact plaintiff's present system of paying taxes in some states and not in others results in Wisconsin residents paying taxes in other states, for the reason that plaintiff under its bylaws utilizes its surplus, after taxes,

by even distribution to all policyholders regardless of what state they live in.

Other than straightening out this inequity of Wisconsin residents contributing to the 50% of the taxes delivered to other states, the impact upon plaintiff would not be great. Under the NAIC (National Association of Insurance Commissioners) zonal system of triennial examination by the Insurance Commissioners, there would be no increased burden. Under the Countersignature Law, sec. 201.44 (1), Wis. Stats., 1961, as administratively construed, policies must be signed by an agent, but however there is no statutory requirement in respect to the amount of commission, if any, to be paid to such agent. It is inconceivable that whatever fiscal arrangements plaintiff would have to make with such agent for such countersignatures would be at all burdensome to plaintiff (especially if it could be obtained free from a group leader). License fees are nominal, initially $200.00 and $25.00 annually thereafter, plus certain other modest fees such as the fee for valuing life insurance reserves of $0.01 for each $1,000.00 of insurance.

It is true, as testified to by plaintiff's insurance expert, Mr. Hubbard, that some competitive advantage enjoyed in the past will be sacrificed by a requirement that plaintiff assume its fair share of tax to defray the expense of administering the Insurance Commissioner's office in Wisconsin, but this is hardly any grounds for invoking the constitutional condemnation of lack of Due Process.

Sec. 201.42 does not offend against the federal and state constitutional provisions prohibiting laws impairing the obligation of contract. The guaranteed renewable pol-

icies issued by plaintiff to persons while they were residents of other states are protected by the exception in sec. 201.42 (2) (b) 3 Stats., as to a continuance of the payment of a premium from Wisconsin after the insured becomes resident in Wisconsin.

Policies issued to residents of Wisconsin prior to the passage of sec. 201.42 were invalid at the time of issuance because in violation of the then existing provisions of the Wisconsin Statutes. Sec. 206.55, 1943 Stats., (Sec. 1978, 1898 Stats.), provided: "No insurance company shall do any insurance business or make any guarantee, contract or pledge for the payment of annuities or endowments or money to the families or representatives of any policy * * * in this state or with any resident of this state except according to the conditions and restrictions of the statutes of this state." Sec. 206.17 (1), 1943 Stats., (sec. 1948f, 1911 Stats.), provided that: "No policy of life or disability insurance * * * shall be issued *or delivered* in this state until the commissioner has approved the same or until there has been filed with him at least thirty days the form of such policy * * *." (Emphasis supplied) Sec. 201.32 (1), 1943 Stats., (C.72#7, 1858 Stats.), provided: "No foreign insurance company shall directly or indirectly transact any insurance business in this state except upon compliance with the requirements of this (money reserves) section." Sec. 201.41, 1943 Stats., (sec. 1917, 1878 Stats.), provided: "No insurance company shall transact business in this state without first having paid the license fees and obtain the license therefor required by law." Any such contract made by plaintiff with a Wisconsin resident prior to the enactment of sec. 201.42 was contrary to the prohibi-

tion of these and several other statutes, and accordingly are void under our law. *Presbyterian Ministers Fund v. Thomas* (1905), 126 Wis. 281, 105 N. W. 801.

This case does not present any constitutional question of violation of the Commerce Clause in the Federal Constitution. Congress was at the time of the enactment of the McCarran-Ferguson Act in 1945, 15 U. S. C. sec. 1011-1012, well aware of the diversity between the insurance business regulation by the various states, and by its enactment of the Act "clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the Commerce Clause * * *." *Prudential Ins. Co. v. Benjamin* (1946), 328 U. S. 408, 431, 66 S. Ct. 1142, 90 L. Ed. 1342, 1361.

Sec. 201.42 is as a criminal statute sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying constitutional principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. If the general class of offenses to which a statute is directed is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts might arise. *United States of America v. Robert M. Harriss* (1954), 347 U. S. 612, 74 S. Ct. 808, 98 L. Ed. 989, 996.

Plaintiff would have no problem in understanding sec. 201.42 even upon a cursory reading that it was applicable to the general modus operandi of plaintiff. Plaintiff certainly knew that it was not licensed as an insurance com-

pany in Wisconsin, and sec. 201.42 (2) (a) provides: "Any of the following acts in this state effected by mail or otherwise is defined to be doing an insurance business in this state. The venue of an act committed by mail is at the point where the matter transmitted by mail is delivered and takes effect. * * * 1. The making of or proposing to make, as an insurer, an insurance contract. * * * 3. The taking or receiving of any application for insurance. * * * 4. The receiving or collection of any premium, commission, membership fees, assessments, dues or other consideration for any insurance or any part thereof. 5. The issuance or delivery of contracts of insurance to residents of this state or to persons authorized to do business in this state. * * *." Subsection (3) reads as follows: "Unauthorized Insurance Prohibited. No person or insurer shall directly or indirectly do any of the acts of an insurance business set forth in sub. (2) except as provided by and in accordance with the specific authorization of statute."

The mailing of a solicitation or offer to insure into Wisconsin is clearly "the making of or proposing to make an insurance contract"; the group leader receives applications and premiums as an agent; the mailing of an insurance policy is a delivery of such policy to a resident of this state; each of which is an invasion of the proscribed area and easily understood as such. Subsection (11) is merely a measurement of the tax base which includes premiums mailed from Wisconsin as well as those paid in Wisconsin.

Upon the basis of the facts presented in this record, sec. 201.42, 1961 Stats., must be declared constitutional and

valid in every respect. The Attorney General may prepare the appropriate Findings of *Ultimate* Fact, and Conclusions of Law, submitting same to opposing counsel ten days before presenting them to the Court for signature.

Dated this 8th day of October, 1964.

BY THE COURT:

NORRIS MALONEY
Judge

ADDENDUM TO MEMORANDUM OPINION
(Formal Parts Omitted)

The Memorandum Opinion is amended by adding to the middle of p. 5 thereof the following:

In *Watson v. Employers Liability Assurance Corp.* (1954), 348 U. S. 66, 75 S. Ct. 166, 99 L. Ed. 74, 81, 82 it was held that due process of law was not violated by a Louisiana statute which permitted a direct action by an injured person against an insurance company, even though the insurance contract was negotiated in Massachusetts where the "no action" clause in the contract was valid which prevented the injured person suing the insurance company until after the liability of the insured had been determined. The decision of the Court was unanimous with Justice Black writing the decision for seven of the Justices in which Justice Black stated on p. 81: "As a consequence of the modern practice of conducting widespread business activities throughout the entire United States, this Court has in a series of cases held that more states than one may seize hold of local activities which are part of

multistate transactions and may regulate to protect interests of its own people, even though other phases of the same transactions might justify regulatory legislation in other states. See, *e.g., Osborn v. Ozlin,* 310 U. S. 53, 84 L. Ed. 1074, 60 S. Ct. 758; *Hoopeston Canning Co. v. Cullen,* 318 U. S. 313, 87 L. Ed. 777, 63 S. Ct. 602, 145 ALR 1113. * * * Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. * * * The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help * * *."

Dated this 9th day of October, 1964.

BY THE COURT:

NORRIS MALONEY
Judge

JUDGMENT

NOW, THEREFORE, in accordance with the above and foregoing

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Sec. 201.42, Wisconsin Statutes, is a validly enacted and constitutional statute.
2. Sec. 201.42, Wisconsin Statutes, is applicable to the conduct by the plaintiff of its insurance business with residents in the State of Wisconsin.

3. The plaintiff in the conduct of its said insurance business, is required to comply with the provisions of Sec. 201.42, Wisconsin Statutes.

4. No costs be taxed herein.

Dated at Madison, Wisconsin, this 19th day of January, 1965.

BY THE COURT:

NORRIS MALONEY
Circuit Judge.

APPENDIX B

STATUTE INVOLVED

"201.42. *Unauthorized insurance.* (1) *Purpose.* The purpose of this section is to subject certain persons and insurers to the jurisdiction of the commissioner, of proceedings before the commissioner, and of the courts of this state in suits by or on behalf of the state and insureds or beneficaries under insurance contracts. The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued by persons and insurers not authorized to do insurance business in this state, thus presenting to such residents the often insuperable obstacle of asserting their legal rights under such policies in forums foreign to them under laws and rules of practice with which they are not familiar. The legislature declares that it is also concerned with the protection of residents of this state against acts by persons and insurers not authorized to do an insurance business in this state by the maintenance of fair and honest insurance markets, by protecting the premium tax revenues of this state, by protecting authorized persons and insurers, which are subject to strict regulation, from unfair competition by unauthorized persons and insurers and by protecting against the evasion of the insurance regulatory laws of this state. In furtherance of such state interest, the legislature herein provides methods for substituted service of process upon such persons or insurers in any proceeding, suit or action in any court and substitute service of any notice, order, pleading or process upon such persons or insurers in any proceeding before the commissioner to enforce or effect full compliance with the insurance and tax statutes of this state, and declares in so doing it exer-

cises its power to protect residents of this state and to define what constitutes doing an insurance business in this state, and also exercises powers and privileges available to this state by virtue of P. L. 79-15 (1945), (Chapter 20, 1st Sess., S. 340), 59 Stat. 33, as amended, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states.

(2) Insurance business defined. (a) Any of the following acts in this state effected by mail or otherwise is defined to be doing an insurance business in this state. The venue of an act committed by mail is at a point where the matter transmitted by mail is delivered and takes effect. Unless otherwise indicated, the term 'insurer' as used in this section includes all corporations, associations, partnerships and individuals, engaged as principals in the business of insurance and also includes interinsurance exchanges and mutual benefit societies.

1. The making of or proposing to make, as an insurer, an insurance contract.

2. The making of or proposing to make, as guarantor or surety, any contract of guaranty or suretyship as a vocation and not merely incidental to any other legitimate business or activity of the guarantor or surety.

3. The taking or receiving of any application for insurance.

4. The receiving or collection of any premium, commission, membership fees, assessments, dues or other consideration for any insurance or any part thereof.

5. The issuance or delivery of contracts of insurance to residents of this state or to persons authorized to do business in this state.

6. Directly or indirectly acting as an agent for or otherwise representing or aiding on behalf of another any person or insurer in the solicitation, negotiation, procurement or effectuation of insurance or renewals thereof or in the dissemination of information as to coverage or rates, or forwarding of applications, or delivery of policies or contracts, or inspection of risks, a fixing of rates or investigation or adjustment of claims or losses or in the transaction of matters subsequent to the effectuation of the contract and arising out of it, or in any other manner representing or assisting a person or insurer in the transaction of insurance with respect to subjects of insurance resident, located or to be performed in this state. The provisions of this subdivision shall not operate to prohibit full-time salaried employes of a corporate insured from acting in the capacity of an insurance manager or buyer in placing insurance in behalf of such employer.

7. The doing of any kind of insurance business specifically recognized as constituting the doing of an insurance business within the meaning of the statutes relating to insurance.

8. The doing or proposing to do any insurance business in substance equivalent to any of the foregoing in a manner designed to evade the provisions of the statutes.

9. Any other transactions of business in this state by an insurer.

(b) The provisions of this subsection do not apply to:

1. The lawful transaction of surplus lines insurance.

2. The lawful transaction of reinsurance by insurers.

3. Transactions in this state involving a policy lawfully solicited, written, and delivered outside of this state covering only subjects of insurance not resident, located, or expressly to be performed in this state at the time of issuance, and which transactions are subsequent to the issuance of such policy.

4. Transactions involving contracts of insurance independently procured through negotiations occurring entirely outside of this state which are reported and on which premium tax is paid in accordance with sub. (12).

5. Attorneys acting in the ordinary relation of attorney and client in the adjustment of claims or losses.

(3) *Unauthorized insurance prohibited.* No person or insurer shall directly or indirectly do any of the acts of an insurance business set forth in sub. (2) except as provided by and in accordance with the specific authorization of statute. In respect to the insurance of subjects resident, located or to be performed within this state this subsection shall not prohibit the collection of premium or other acts performed outside of this state by persons or insurers authorized to do business in this state provided such transactions and insurance contracts otherwise comply with statute.

* * *

(6) Unauthorized person or insurer defense of action. (a) Before any unauthorized person or insurer files or causes to be filed any pleading in any court action, suit or proceeding or in any notice, order, plead-

ing or process in such administrative proceeding before the commissioner instituted against such person or insurer, by service made as provided in subs. (4) and (5), such person or insurer shall either:

1. Deposit with the clerk of the court in which such action, suit or proceeding is pending, or with the commissioner in administrative proceedings before the commissioner, cash or securities or bond with good and sufficient sureties to be approved by the court or the commissioner, in an amount to be fixed by the court or the commissioner sufficient to secure the payment of any final judgment which may be rendered in such court proceeding or in such administrative proceeding before the commissioner, provided that the court or the commissioner in administrative proceedings before the commissioner may in its or his discretion make an order dispensing with such deposit or bond where the insurer makes a showing satisfactory to such court or the commissioner that it maintains in a state of the United States funds or securities, in trust or otherwise, sufficient and available to satisfy any final judgment which may be entered in such court action, suit or proceeding or in such administrative proceeding before the commissioner; or

2. Procure proper authorization to do an insurance business in this state.

(b) The court in any action, suit or proceeding in which service is made as provided in sub. (4) or the commissioner in any administrative proceeding before the comissioner in which service is made as provided in sub. (5), may, in his discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with par. (a) and to defend such court action or administrative proceeding.

(c) Nothing in par. (a) is to be construed to prevent an unauthorized person or insurer from filing a motion to quash a writ or to set aside service thereof made as provided in sub. (4) or (5) on the ground that such unauthorized person or insurer has not done any of the acts enumerated in sub. (2) or that the person on whom service was made pursuant to sub. (4) (d) was not doing any of the acts therein enumerated.

(7) *Attorney fees.* In an action against an unauthorized person or insurer upon a contract of insurance isued or delivered in this state to a resident thereof or to a corporation authorized to do business therein, if the person or insurer has failed for 30 days after demand prior to the commencement of the action to make payment in accordance with the terms of the contract, and it appears to the court that such refusal was vexatious and without reasonable cause, the court may allow to the plaintiff a reasonable attorney fee and include such fee in any judgment that may be rendered in such action. Failure of the person or insurer to defend any such action shall be deemed prima facie evidence that its failure to make payment was vexatious and without reasonable cause.

(8) *Validity of insurance contracts.* Except for lawfully procured surplus lines insurance and contracts of insurance independently procured through negotiations occurring entirely outside of this state which are reported and on which premium tax is paid in accordance with sub. (12), any contract of insurance effective in this state and entered into by an unauthorized insurer is unenforcible by such insurer. In event of failure of any such unauthorized insurer to pay any claim or loss within the provisions of such insurance contract, any person who assisted or in any manner aided directly or indirectly in the procurement of

such insurance contract shall be liable to the insured for the full amount thereof pursuant to the provisions of such insurance contract.

(9) *Investigation and disclosure of insurance contracts.* (a) Whenever the commissioner has reason to believe that insurance has been effectuated by or for any person in this state with an unauthorized insurer the commissioner shall in writing order such person to produce for examination all insurance contracts and other documents evidencing insurance with both authorized and unauthorized insurers and to disclose to the commissioner the amount of insurance, name and address of each insurer, gross amount of premium paid or to be paid and the name and address of the person or persons assisting or aiding in the solicitation, negotiation or effectuation of such insurance.

(b) Every person who, for 30 days after such written order pursuant to par. (a), neglects to comply with the requirements of such order or who willfully makes disclosure that is untrue, deceptive or misleading shall forfeit $50 and an additional $50 for each day of neglect after expiration of said 30 days.

(10) *Reporting of unauthorized insurance.* (a) Every person investigating or adjusting any loss or claim on a subject of insurance in this state shall immediately report to the commissioner every insurance policy or contract which has been entered into by any insurer not authorized to transact such insurance in this state.

(b) Every person acting in the capacity of insurance adviser, counselor or analyst in accordance with s. 209.045, shall report to the commissioner every insurance policy or contract covering a subject of insurance in this state which has been entered into by an

insurer not authorized to transact such insurance in this state.

(c) This subsection does not apply to transaction in this state involving a policy lawfully solicited, written, and delivered outside of this state covering only subjects of insurance not resident, located or expressly to be performed in this state at the time of issuance, and which transactions are subsequent to the issuance of such policy.

(11) *Unauthorized insurance premium tax.* (a) Except as to premiums on lawfully procured surplus lines insurance and premiums on independently procured insurance on which a tax has been paid pursuant to sub. (12), every unauthorized insurer shall pay to the commissioner before March 1 next succeeding the calendar year in which the insurance was so effectuated, continued or renewed a premium receipts tax of 3 per cent of gross premiums charged for such insurance other than marine insurance and a premium receipts tax of one-half of one per cent of gross premiums charged for such marine insurance on subjects resident, located or to be performed in this state. Such insurance on subjects resident, located or to be performed in this state procured through negotiations or an application, in whole or in part occurring or made within or from within or outside of this state, or for which premiums in whole or in part are remitted directly or indirectly from within or outside of this state, shall be deemed to be insurance procured, or continued or renewed in this state. The term 'premium' includes all premiums, membership fees, assessments, dues and any other consideration for insurance. Such tax shall be in lieu of all taxes and fire department dues. On default of any such unauthorized insurer in the payment of such tax the insured shall pay the tax. If the

tax prescribed by this subsection is not paid within the time stated, the tax shall be increased by a penalty of 25 per cent and by the amount of an additional penalty computed at the rate of one per cent per month or any part thereof from the date such payment was due to the date paid.

(b) If a policy covers risks or exposures only partially in this state, the tax payable shall be computed on the portions of the premium which are properly allocable to the risks or exposures located in this state. In determining the amount of premiums taxable in this state, all premiums written, procured, or received in this state and all premiums on policies negotiated in this state shall be deemed written on property or risks located or resident in this state, except such premiums as are properly allocated or apportioned and reported as taxable premiums of any other state or states.

(12) *Independently procured insurance.* (a) Every insured who procures or causes to be procured or continues or renews insurance with any unauthorized insurer, or any insured or self-insurer who so procures or continues excess loss, catastrophe or other insurance, upon a subject of insurance resident, located or to be performed within this state, other than insurance procured through a surplus lines agent pursuant to the surplus lines law of this state shall within 60 days after the date such insurance was so procured, continued, or renewed, file a report of the same with the commissioner in writing and upon forms designated by the commissioner and furnished to such an insured upon request. The report shall show the name and address of the insured or insureds, name and address of the insurer, the subject of the insurance, a general description of the coverage, the amount of pre-

mium currently charged therefor, and such additional pertinent information as is reasonably requested by the commissioner.

(b) Any insurance in an unauthorized insurer of a subject of insurance resident, located or to be performed within this state procured through negotiations or an application, in whole or in part occurring or made within or from within or outside of this state, or for which premiums in whole or in part are remitted directly or indirectly from within or outside of this state, shall be deemed to be insurance procured, or continued or renewed in this state within the intent of par. (a).

(c) There is hereby levied upon the obligation, chose in action, or right represented by the premium charged for such insurance, a premium receipts tax of 3 per cent of gross premiums charged for such insurance other than marine insurance and a premium receipts tax of one-half of one per cent of gross premiums charged for such marine insurance. The term 'premium' shall include all premiums, membership fees, assessments, dues and any other consideration for insurance. Such tax shall be in lieu of all taxes and fire department dues. The insured shall, before March 1 next succeeding the calendar year in which the insurance was so procured, continued or renewed, pay the amount of the tax to the commissioner. In event of cancellation and rewriting of any such insurance contract the additional premium for premium receipts tax purposes shall be the premium in excess of the unearned premium of the canceled insurance contract.

(d) If a policy covers risks or exposures only partially in this state, the tax payable shall be computed on the portions of the premium which are properly allocable to the risks or exposures located in this state. In determining the amount of the premiums taxable

in this state, all premiums written, procured or received in this state and all premiums on policies negotiated in this state shall be deemed written on property or risks located or resident in this state, except such premiums as are properly allocated or apportioned and reported as taxable premiums of any other state or states.

(e) If the insured fails to withhold from the premium the amount of tax herein levied, the insured shall be liable for the amount thereof and shall pay the same to the commissioner within the time stated in par. (c). If the tax prescribed by this subsection is not paid within the time stated in par. (c), the tax shall be increased by a penalty of 25 per cent and by the amount of an additional penalty computed at the rate of one per cent per month or any part thereof from the date such payment was due to the date paid.

(f) The attorney general, upon request of the commissioner, shall proceed in the courts of this or any other state or in any federal court or agency to recover such tax not paid within the time prescribed in this section.

(g) This subsection shall not be construed or deemed to abrogate or modify any provision of this section. This subsection does not apply as to individual life or individual disability insurance.

(13) *Penalty for unauthorized insurance.* (a) Any unauthorized insurer who does any unauthorized act of an insurance business as set forth in sub. (2) shall be fined not more than $5,000.

(b) In addition to any other penalty provided for herein or otherwise provided by law, any person or insurer violating this section shall forfeit to the people of this state the sum of $500 for the first offense and

an additional sum of $500 for each month during which any such person or insurer continues such violation.

(15) *Nonapplication of section.* This section shall not apply to any life insurance company organized and operated, without profit to any private shareholder or individual, exclusively for the purpose of aiding educational or scientific institutions organized and operated without profit to any private shareholder or individual by issuing insurance and annuity contracts direct from the home office of the company and without agents or representatives in this state only to or for the benefit of such institutions and to individuals engaged in the services of such institutions; nor shall this section apply to any life, disability or annuity contracts issued by such life insurance company, provided such contracts otherwise comply with the statutes."

THE McCARRAN-FERGUSON ACT

Act of March 9, 1945, c. 20, 59 Stat. 33;
U. S. C., Title 15, Secs. 1011 *et seq.*

AN ACT

To express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the busi-

ness of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

Approved March 9, 1945.

APPENDIX C

PERTINENT PROVISIONS OF UNITED STATES CONSTITUTION

"Article I, Section 8. * * *

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; * * *

"To establish post offices and post roads; * * *"

"Article I, Section 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

"Article VI.

"All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation.

"This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding. * * *"

FOURTENTH AMENDMENT.

"Article XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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In The

SUPREME COURT of the UNITED STATES

October Term, 1966

Number 634

MINISTERS LIFE AND CASUALTY UNION,
Appellant,

vs.

ROBERT D. HAASE,
Commissioner of Insurance,
and
BRONSON C. LA FOLLETTE,
Attorney General of the State of Wisconsin,
Appellees.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

MOTION OF APPELLEES TO DISMISS APPEAL AND BRIEF

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

E. WESTON WOOD
Assistant Attorney General

Attorneys for Appellees

Post Office Address:
114 East
State Capitol
Madison, Wisconsin 53702

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In The

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MINISTERS LIFE AND CASUALTY UNION,
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and

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Attorney General of the State of Wisconsin,
Appellees.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal taken herein be dismissed on the ground that no substantial Federal question is presented.

QUESTIONS PRESENTED

Does the application of the regulatory and taxing provisions of Section 201.42 of the Wisconsin Statutes to the individual and group life and health insurance business of the appellant, a Minnesota corporation not licensed in Wisconsin, with Wisconsin residents, which business is conducted through the United States mail and by using in Wisconsin investigatory and medical services paid for by the appellant, violate the commerce, due process, contract or postal clauses of the Constitution of the United States?

STATEMENT OF CASE

The following facts were found by the trial court. Page references are to the pagination of the record in this Court.

Appellant, a Minnesota corporation, is a mutual legal reserve insurance company having its home and only office in Minnesota. All of its policyholders are members of the company and the owners thereof. Appellant writes life and accident and health insurance, covering only persons engaged in religious work or study and their families, throughout the United States and Canada, operating generally on a mail-order basis. It is licensed in most Canadian provinces and in the states of Minnesota, California, Georgia, Illinois, Indiana, Kentucky, Ohio, Tennessee, Texas and Virginia, but not in Wisconsin. Except for Minnesota and Ontario—where appellant was licensed much earlier—it became licensed in such jurisdictions from 1953 to 1957. Appellant has one agent in Canada and one in each state, except Kentucky and Virginia, in which it is licensed (R. 146-147).

At the close of 1961, appellant's admitted assets were $23 million, its reserves were $13.6 million, its surplus was $2.8 million and its insurance in force was $101 million. During 1961 its insurance written was $19 million and its total premium received was $7,229,000, of which $3,373,921 was derived from jurisdictions in which it was licensed. Appellant has returned to its policyholders in payment of accident and health claims a higher proportion of premiums collected than the national average of all accident and health insurers (R. 147-148).

Appellant issues individual life and accident and health, group life and franchise group accident and health insurance policies. The appellant has no right to cancel the life policies, so long as premiums are paid; and many of the individual accident and health policies give the insureds the right to continue the policies for extended periods by timely premium payments. Appellant renews, collects premiums upon and services its policies regardless of whether the policyholder continues to reside in the state of his residence at the issuance of the policy, and approximately one-third of appellant's policies now held by Wisconsin residents were issued when the policyholders resided elsewhere (R. 148-149).

In August, 1962, appellant had in force 626 individual life policies averaging $3,750 each, 1842 individual accident and health policies, two group life policies covering 85 persons and six franchise group accident and health policies covering 350 persons, all of which insureds were then Wisconsin residents (R. 149).

Appellant solicits the sale and renewal of policies to residents of all states through mail solicitation and magazine advertisements. In those states wherein appellant is licensed, it also solicits through its licensed agents; but most of appellant's policies covering residents of such states are solicited by magazine advertisements or by mail from the home office (R. 149-150).

Appellant collects premiums upon and services all of its policies by mail between the home office and policyholders at their residences. Almost all premium payments are mailed by policyholders to the appellant's home office (R. 150).

Approximately six times each year the appellant mails from its home office to an estimated 60,000 to 140,000 persons printed matter soliciting the purchase or renewal of insurance; and approximately twelve times each year appellant mails particular solicitations to from 6,000 to 8,000 persons deemed to be good prospects because of birthdays, marriages or birth of children. Annually about 25,000 solicitations are mailed by appellant to approximately 3,600 Wisconsin residents. The advertising material of the appellant is not approved, prior to use, by the Minnesota commissioner of insurance but is filed with him (R. 150-151).

Policies sold by appellant through mail solicitation are effected by the prospect mailing to the home office an application usually accompanied by the first premium. Appellant, upon approving the application, mails the policy to the insured, making it effective on the date the application and premium were received. Appellant's articles of incorporation provide that a person becomes a member by the delivery and acceptance of a policy. Appellant, in accord with general practice of mail order companies, allows an applicant to examine and reject a policy, in which case the premium is refunded (R. 151-152).

If, for underwriting purposes, appellant requires information additional to that in the application, appellant obtains such information through correspondence with the applicant, his local doctor or one selected by appellant or a nation-wide investigatory agency. The fees of such doctors and agencies are paid by appellant. Medical reports and physical examinations by local doctors are an integral part of appellant's business. Except for a medical director at the home office, appellant maintains no doctor in any

state for underwriting or claim settlement purposes (R. 152.)

Appellant utilizes the services of three nation-wide investigatory agencies to make local investigations and reports for purposes of underwriting and claims settlement. Such agencies are independent contractors, but appellant pays their charges and determines the extent of the investigations. Obtaining information by such local investigations is an integral part of appellant's business (R. 153).

In appellant's group life and group franchise accident and health business a leader selected by the group represents it in negotiating the insurance contract with the home office by mail or telephone. The leader is not paid by appellant. He obtains executed enrollment cards or applications from members of the group and forwards such papers, together with the first premium to the home office by mail. Subsequent premium billings for group life are sent by appellant to the leader who collects premiums and mails them to appellant. When a new member joins the group, the leader obtains from him an executed enrollment card or application and mails it to appellant. Appropriate forms and advertising material are mailed to the leader from the home office (R. 153-155).

Payments of benefits under appellant's policies are approved by the home office and made by checks drawn on a Minneapolis bank and mailed to the beneficiaries or claimants, except where payment to a hospital or doctor is requested. Claims are made upon forms mailed from the home office to claimants or beneficiaries and by them completed and mailed back to the home office. When appel-

lant requires additional information, it is obtained by mail between the home office and claimants, beneficiaries and local doctors and officials and by local investigations and physical examinations. Such investigations and examinations are paid for by appellant, are made through a procedure similar to that used for underwriting examinations and investigations and are an integral part of appellant's business. Appellant handles claims under all policies in the same manner, regardless of whether the policy was issued to, or the claim is made by, a resident of a state in which appellant is licensed (R. 155-157).

Other than the previously mentioned group leaders, local doctors and investigatory agencies, appellant has no officer, agent or employee in Wisconsin for doing any kind of insurance business (R. 157).

Any excess of premiums over expenses, claims paid and reserves is either returned to appellant's policyholders as dividends, used to make rate adjustments or retained as surplus. Dividends are paid only on life policies. Appellant's surplus increased from $1,630,133 on December 31, 1951, to $2,835,713 on December 31, 1961. Appellant uses the same rates and dividend scales in all states, regardless of whether a policyholder resides in a state where appellant is licensed and pays premium taxes and fees. Thus every policyholder in a state where appellant is not licensed contributes more toward payment of such taxes and fees and to surplus than does a resident of a state where appellant is licensed (R. 158-159).

In 1961 fees paid by appellant to states in which it was licensed and to Canadian provinces totaled only $5,481, or

less than 2/10 of 1% of the $3,374,000 premium income from those states and provinces. The following table shows appellant's 1961 and 1955 premium income from Wisconsin and each state where appellant is licensed:

	1961	*1955*
Wisconsin	$208,240	$ 83,516
California	782,688	175,317
Georgia	100,085	36,140
Illinois	434,451	169,049
Indiana	185,960	76,207
Kentucky	96,985	50,546
Minnesota	442,378	157,542
Ohio	304,764	131,932
Tennessee	101,360	51,039
Texas	394,934	139,261
Virginia	137,374	76,655

Fees and charges payable by a foreign insurance company licensed in Wisconsin are modest and impose no substantial burden on a company such as appellant. They are $200 for initial license, $25 for annual renewal, $25 for filing the required annual statement and not over $.01 per $1,000 of life insurance reserves. Wisconsin fees for a resident insurance agent's license also are modest and would impose no substantial burden on appellant. Such fees are $5 for examination, $1 for initial license and $1 for annual renewal (R. 159-160).

Premium taxes imposed by states and provinces where appellant is licensed are from 2% to 3½% of premium in-

come from the state or province. The premium tax imposed by sections 76.32 and 76.34, Wisconsin Statutes, on foreign life and casualty insurance companies is 2% of premiums on policies on lives of Wisconsin residents. Such tax would not constitute a substantial or undue burden upon appellant (R. 160).

Policies issued by appellant to residents of a state where appellant is licensed are submitted to regulatory officials of such state prior to use. Insurance companies licensed in various states use a prototype of policy complying with requirements of most states, with separate endorsements to satisfy requirements of individual states. Appellant uses this method for complying with requirements of states where it is licensed. Appellant annually files a statement with the Minnesota insurance department and a copy with the regulatory authority of each state where appellant is licensed. Filing a copy with the Wisconsin insurance commissioner would impose no burden on appellant other than a nominal filing fee (R. 160-161).

Appellant is subject to examination by each state where it is licensed. Under the zone examination system of the National Association of Insurance Commissioners a single examination is made for all states where appellant is licensed. Under such system, no additional examination would be conducted by Wisconsin (R. 161).

Foreign insurance companies licensed in Wisconsin conduct mail order insurance business from their home offices with Wisconsin residents. The regulatory cost to appellant from becoming licensed in Wisconsin would not be burdensome (R. 161).

There are serious abuses in solicitation and other practices of foreign insurance companies not licensed in a state but doing a mail order business with residents of such state, and effective regulation thereof is a problem. The problem exists in Wisconsin. Since 1945 there has been a substantial increase in the number of foreign companies not licensed in Wisconsin but conducting a mail order business covering residents and risks in Wisconsin, and in 1962 there were at least 79 such companies. Regulation of such business, by the Federal Trade Commission or by the state of domicile of such a company, is inadequate to protect the interests of Wisconsin residents. Minnesota lacks authority to approve or disapprove policy forms issued to Wisconsin residents (R. 161-162).

Wisconsin carries on substantial activities which reduce potential losses under policies of life and accident and health insurance covering Wisconsin residents and substantially benefit a company issuing such policies. These activities include licensing and regulating professions, businesses and institutions affecting public health and safety; enforcement of public health standards; operation of public insfitutions for treating the sick, a comprehensive workmen's compensation program and police and fire protection systems; and the regulation of motor vehicles and highway use (R. 162-163).

The apellant's activities by mail in soliciting, issuing and servicing life and accident and health insurance policies with Wisconsin residents while they are within the state are regular, systematic and continuous and with large numbers of Wisconsin residents. Such activities are not isolated and infrequent (R. 163).

Upon these facts the trial court entered judgment declaring that section 201.42, Wisconsin Statutes, was constitutional and applicable to appellant in the conduct of its insurance business with Wisconsin residents and that appellant must comply with such statute. That judgment was affirmed by the Wisconsin Supreme Court.

ARGUMENT

The issue in the present case is whether the Wisconsin statute involved is constitutional and applicable to appellant, not whether it may be applicable to some other insurance company operating by different methods, having different contacts with Wisconsin and its residents and having a different impact upon the interests of Wisconsin. The opinion of the Wisconsin Supreme Court makes this clear by saying:

> "• • • We do not hold, however, that any one single act defined as doing business in the state in sec. 201.42 is alone sufficient for the application of the section to a given business. Each set of facts must be considered on its own merits when applying the statute." (R. 307)

No Substantial Federal Question Is Presented

Neither the Notice of Appeal nor the Jurisdictional Statement raises any issue as to the findings of fact made by the trial court and relied upon by the Wisconsin Supreme Court in its decision. Furthermore, the Wisconsin Supreme Court was not asked to pass upon the sufficiency of the evidence to support those findings. In view of this,

the applicability of Federal constitutional provisions in the instant case must be determined in light of those findings of fact. *Fry Roofing Co. v. Wood,* 344 U. S. 157, at 160; *Grayson v. Harris,* 267 U. S. 352, at 358.

Appellant contends that the McCarran-Ferguson Act (Act of March 9, 1945, 59 Stat. 33, 15 U. S. C. secs. 1011 et seq.) limited state taxing and regulatory authority over interstate insurance transactions to such authority as the states had been held to possess at the time the Act was passed. Even if the contention is accepted, the application of sec. 201.42, Wisconsin Statutes, to appellant's business with Wisconsin residents is within the jurisdiction of the state.

Osborn v. Ozlin, 310 U. S. 53, and *Hoopeston Canning Co. v. Cullen,* 318 U. S. 313, were decided in 1940 and 1942, respectively, before the passage of the McCarran-Ferguson Act. Those two cases established that a state has jurisdiction over unlicensed foreign insurance companies insuring risks within her borders, when the regulating state has a sufficient interest in the objects insured and multitudinous activities in connection with the business—before and after the making of the contracts—occur within the regulating state.

The opinion in the *Osborn* case stated, 310 U. S. at 62:

> "Virginia has not sought to prohibit the making of contracts beyond her borders She merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed. This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business,

the effect of that business on Virginia, and Virginia's regulation of it."

This holding of the *Osborn* case was not predicated upon the fact that the plaintiff insurance companies were licensed in Virginia. The statute there involved applied to companies licensed in the state and prohibited such companies from making insurance contracts covering persons or property within Virginia except through licensed, resident agents. The opinion carefully pointed out, 310 U. S. at 65:

> "* * * For it is clear that Virginia has a definable interest in the contracts she seeks to regulate and that what she has done is very different from the imposition of conditions upon appellants' privilege of engaging in local business which would bring within the orbit of state power matters unrelated to any local interests. * * *"

In *Hoopeston* it was said, 318 U. S. at 319:

> "We conclude that in determining whether insurance business is done within a state for the purpose of deciding whether a state has power to regulate the business, considerations of the location of activity prior and subsequent to the making of the contract, Osborn v. Ozlin, supra, of the degree of interest of the regulating state in the object insured, and of the location of the property insured are separately and collectively of great weight. Applying any of these tests, it is apparent that the reciprocals are doing business in New York and are thereby subject to regulation by that state."

The *Osborn* and *Hoopeston* cases were in no way overruled or questioned in *State Board of Insurance v. Todd Shipyards Corp.*, 370 U. S. 451, relied upon by appellant.

In *Todd* the opinion expressly noted that the Court in *Osborn* and *Hoopeston* gave broad scope to local regulation of the insurance business and carefully distinguished *Todd* because there the insurers carried on *no* activities within Texas, the regulating state, by mail or otherwise.

In the instant case, unlike *Todd,* appellant pours thousands of mail and other solicitations into the regulating state annually, utilizes and pays local doctors and investigatory agencies for services in the state, utilizes group leaders to distribute advertisements and obtain applications for insurance, mails into the state policies which are subject to acceptance or rejection by residents within the state and mails into the state checks in payment of claims. Unlike *Todd,* the insurance here is upon the lives and health of thousands of residents of the regulating state.

The limits of state jurisdiction to regulate and tax interstate insurance transactions, as enunciated by this Court prior to the McCarran-Ferguson Act, clearly embrace the power sought to be exercised by Wisconsin over this appellant.

Appellant seeks to compare itself with two *amici curiae* which submitted a brief in the *Todd* case—Church Fire Insurance Corporation and Catholic Relief Insurance Company. Those two companies insured church properties, not the lives and health of thousands of individuals, and their business was much smaller that that of the appellant.

Also their brief discloses nothing akin to appellant's many contacts with Wisconsin.

Cases subsequent to the McCarran-Ferguson Act likewise support the jurisdiction asserted by Wisconsin over this appellant. *Travelers Health Asso. v. Virginia,* 339 U. S. 643, and *Federal Trade Comm. v. Travelers Health Asso.,* 362 U. S. 293.

The Jurisdictional Statement merely presents without argument three questions which scarcely require comment.

Appellant's contentions with regard to Section 10 and clause 7 of Section 8, Article I of the Constitution—the contract and postal clauses—raise no Federal question. The record is devoid of evidence of a single contract the obligation of which might be impaired by enforcement of section 201.42, Wisconsin Statutes. In order to raise a question under the contract clause it would be necessary to point to some contract, valid when made, whose obligations would be impaired by the statute. *Munday v. Wis. Trust Co.,* 252 U. S. 499, at 503. Also, the statute does not attempt to regulate the mail—merely the activities resulting from use of the mails.

Appellant's assertion of a Federal question predicated upon the due process clause and the penal provisions of sec. 201.42, Wisconsin Statutes, is without merit.

CONCLUSION

The facts of this case do not present any substantial Federal question, and the appeal should be dismissed.

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin,
Counsel for Appellees

E. WESTON WOOD
Assistant Attorney General
of Wisconsin

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BRONSON C. LA FOLLETTE,
Attorney General of the State of Wisconsin,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE APPELLANT IN OPPOSITION TO THE APPELLEES' MOTION TO DISMISS

ERWIN N. GRISWOLD
Langdell Hall
Cambridge, Massachusetts

Counsel for Appellant

FRANK A. ROSS
1 South Pinckney Street
Madison, Wisconsin

Of Counsel

THE GILMAN PRESS, INC., MADISON, WISCONSIN

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The Appellees' motion to dismiss asks the Court to upset an unbroken constitutional understanding and a long-continued course of business on the ground that no substantial Federal question is involved. The Appellees do not suggest that non-resident insurance companies conducting their affairs as the Appellant does have heretofore been considered to be subject to taxation and regulation in any State, including Wisconsin. The Appelleees point to

no previous case subjecting a mail-order insurance company, doing business as the Appellant does, to State taxation and regulation. The fact that Wisconsin is the first State actively seeking to impose such a tax and regulatory measure shows the depth of the constitutional understanding which would be upset if the decision below is allowed to stand. Such a change in constitutional doctrine clearly presents a substantial Federal question.

As the Appellees state, there is no controversy as to the facts. The decision of the court below did not turn on any disputed questions of fact, and this Court is not asked to review any factual question. The Appellees do endeavor to show that compliance with the Wisconsin statute would not subject the Appellant to any substantial burden. This presentation, however, does not recognize two important factors: (a) If Wisconsin can tax and regulate, all States can tax and regulate, and the aggregate burden on a small company will be very great. This is not something which the company can control, as it must accept renewals from its policyholders wherever they may be when they seek to renew their policies. (b) If Wisconsin can regulate the activities of the Appellant, then the Wisconsin "resident agent" law will be applicable. Sec. 201.44 (1) of the Wisconsin Statutes.[1] This would greatly increase the Appel-

[1] "(1) No policy of insurance shall be solicited, issued or delivered in this state, except through an agent lawfully authorized as to the kind of insurance effected by such policy. Under such regulations and restrictions as is [sic] deemed necessary by the commissioner of insurance, licenses may be issued to nonresident agents, other than persons who represent the insured, who are licensed by the state in which they reside upon payment of . . . . [an annual fee of $10]; but such agents shall not countersign any policy or contract of insurance."

This also explains the interest of the two agency groups (The National Association of Life Underwriters and The Wisconsin Association of Life Underwriters) which filed an **amicus** brief in the court below supporting the Wisconsin statute.

lant's cost of doing business, and would make its business impractical except in metropolitan areas. It is clear, therefore, that the interests at stake here, as well as the constitutional questions, are substantial.

If the decision below stands, a well-recognized and long-continued method of conducting a portion of the insurance business in this country will be gravely affected.

In saying that no substantial Federal question is involved, the Appellees rely primarily on four cases. None of these cases supports the Appellees' conclusion.

(a) In *Osborn v. Ozlin,* 310 U. S. 53 (1940) which was decided before 1945, the Virginia statute involved was, by its terms, applicable only to "Insurance companies, legally authorized to do business in this State . . ." Virginia Code, Sec. 4222(a), quoted in footnote 1, at 310 U. S. 59. As the Court stated at 310 U. S. 60, "The bill was brought by foreign corporations *authorized to do casualty and surety business in Virginia . . .*" (Italics added.) The sole question related to the power of Virginia over a corporation which had "qualified" in Virginia, and had thus chosen to do a local business in Virginia subject to Virginia regulation.

In the present case, Ministers has not qualified in Wisconsin. It has not subjected itself to the general authority of Wisconsin by its voluntary act. Indeed, *Osborn* shows clearly just what Ministers is most concerned about, and why this case does present substantial Federal questions.

(b) The other case decided before 1945 is *Hoopeston Canning Co. v. Cullen,* 318 U. S. 313 (1943). *Hoopeston* presents a situation which is quite different from the facts of this case. In the first place, this Court noted in 318 U. S.

at 315 that: "These reciprocals have been annually licensed to do business in New York since 1930 . . ." Thus, *Hoopeston* involved companies which had qualified to do business in New York. What they were seeking in the proceeding which came to this Court in *Hoopeston* was a declaratory judgment that though they had qualified they would not be subject to certain provisions of the New York statute. In substance, what this Court decided was that where an insurance company qualifies to do business in New York the provisions of New York law applicable to qualified companies were valid as applied to Hoopeston. Obviously this has nothing to do with the question involved here, which is, the extent to which a State may apply its laws to a company which has not qualified in the State, and which conducts its business by mail and without any agents or offices in the State.

Moreover, the facts involved in *Hoopeston* were quite different from those involved here. It was Hoopeston's practice to send one "of a group of insurance engineers . . . to New York to investigate the risk. . . ." 318 U. S. at 317. In addition, as this Court said, "The insurance engineers may visit the subscriber from time to time to encourage the reduction of fire hazards or to investigate the cause and extent of losses, and on such trips the engineer may give information concerning the enterprise to prospective participants, although he does not actively solicit business." 318 U. S. at 317-318. In addition, "The contracts reserved the right of the reciprocals to go into New York to repair, rebuild, or replace lost or damaged property." 318 U. S. at 318.

These facts show that in *Hoopeston* the companies were actively engaged in producing and in carrying out business in New York, through their own agents. There are no similar facts in the present case.

Thus it is clear that there was no decision of this Court prior to the McCarran-Ferguson Act (Act of March 9, 1945, 59 Stat. 33; 15 U. S. C. secs. 1011 et seq.—see pp. 54b-56b of the Jurisdictional Statement) which had upheld the power of a State to regulate or to tax a foreign insurance company, not qualified to do business in the State, and conducting its business on the mail-order basis, without offices or agents in the State. If, as we contend, and as this Court held in *State Board of Insurance v. Todd Shipyards Corp.*, 370 U. S. 451 (1962), the McCarran-Ferguson Act was intended by Congress as a still-stand as far as taxation and regulation are concerned, then there is no basis for the decision below.

(c) *Travellers Health Assn. v. Virginia*, 339 U. S. 643 (1950), is next cited as supporting the jurisdiction of Wisconsin in this case. That case arose on a special appearance to contest the jurisdiction of the Virginia courts over a nonresident mail-order insurance company. This Court held that the State had power "to issue a 'cease and desist order' enforcing at least that regulatory provision requiring the Association to accept service of process by Virginia claimants on the Secretary of the Commonwealth." 339 U. S. at 647.

There is no such issue in this case. As stated on page 6 of the Jurisdictional Statement, the Appellant has not drawn into question the provision of the Wisconsin statute providing for service of process on the Commissioner of In-

surance. Such provisions are not within the still-stand of the McCarran-Ferguson Act, as construed in *Todd Shipyards*. The McCarran-Ferguson Act relates by its terms only to "regulation or taxation" by the several states, and has not affected the development of the law with respect to the question of jurisdiction of courts. Sec. 1 of McCarran-Ferguson Act, quoted at p. 54b of the Jurisdictional Statement.

(d) Finally, *Federal Trade Commission v. Travellers Health Assn.*, 362 U. S. 293 (1960), is cited in the motion to dismiss. But this case seems clearly to support the position of the Appellant here. The *Federal Trade Commision* case was cited by this Court in the *Todd Shipyards* opinion as holding that "Congress has posited a regime of state regulation on the continuing validity of specific prior decisions." 370 U. S. at 457. This is our position here. Moreover, the very basis of *Federal Trade Commission* is that the Federal Trade Commission *can* regulate non-resident mail-order insurance companies because this is an appropriate exercise of Federal power over interstate commerce and the non-domiciliary States canot do so effectively for constitutional reasons.[2]

In enacting the McCarran-Ferguson Act, Congress expressly stated that "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the

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[2]In **Federal Trade Commission v. Travellers Health Assn.**, 362 U. S. 293, 297, this Court quoted from its opinion in **Federal Trade Commission v. National Casualty Co.**, 357 U. S. 560, 564 (1958), where it referred to "interstate insurance practices which the States cannot for constitutional reasons regulate effectively."

decision of the United States Supreme Court in the *Southeastern Underwriters Association* case." H. R. Rep. No. 143, 79th Congress, 1st Session, p. 3; quoted at p. 13 of the Jurisdictional Statement. The Appellees have pointed to no case in this Court which sustains State authority as broad as that upheld by the Court below. Thus, that decision goes beyond the power which the States "had been held to possess prior to" the *Southeastern Underwriters* decision, and should therefore be held to go beyond the power granted to the States by the McCarran-Ferguson Act.

We have not argued other questions in the Jurisdictional Statement because our purpose there was to show that the basic questions in this case are clearly and directly presented and are substantial.

CONCLUSION

The questions presented are substantial, materially affecting the transaction of a significant segment of the insurance business in this country. The motion to dismiss should be denied, and probable jurisdiction should be noted.

Respectfully submitted,

ERWIN N. GRISWOLD

Langdell Hall
Cambridge, Massachusetts

Counsel for Appellant

FRANK A. ROSS

1 South Pinckney Street
Madison, Wisconsin

Of Counsel

November, 1966

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Appellees.

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THOMAS C. LYNCH,
Attorney General,
H. WARREN SIEGEL,
Deputy Attorney General,
600 State Building,
Los Angeles, Calif. 90012,
Attorneys for Amicus Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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INTEREST OF THE AMICUS CURIAE.

The State of California, acting by and through Thomas C. Lynch, Attorney General, files this brief, as amicus curiae, on behalf of the State of Wisconsin and in support of the Motion To Dismiss Appeal filed herein.

It is not the purpose of this brief to discuss the facts in the *Ministers Life* case. This has been done by counsel for the parties and by the Supreme Court of Wisconsin. The purpose of this brief is to set forth

the position of the State of California on the issues (1) whether the due process clause of Amendment 14 to the United States Constitution prevents the several states from regulating a mail order insurance company where the company solicits from and negotiates insurance with local residents, and (2) whether the McCarran Act, 15 U.S.C. §§ 1011-15, as construed in *State Bd. of Ins. v. Todd Shipyards*, 370 U.S. 451 (1962), prevents the above described regulation.

California is interested in the determination of these issues because a case similar to *Ministers Life* is now pending before the Supreme Court of California. Any action by this Court in this case will no doubt have an effect on the pending cases in California. The opinion of the California District Court of Appeal in the pending cases is citable at 244 A.C.A. 925, 53 Cal. Rptr. 636.

ARGUMENT.

I.

A State May Regulate Insurance Business Done Within Its Borders.

A. The Historical Context of the Meaning of "Doing Business."

The test of whether a company is doing business in a state so that it may be regulated and taxed by that state has been the subject of two definitions by this Court. One line of cases finds that a company is doing business only at the place the insurance contract is made, delivered, and paid for. *Allgeyer v. Louisiana,* 165 U.S. 578, 587-88 (1897); *St. Louis Compress Co. v. Arkansas,* 260 U.S. 346, 347-49 (1922); *Conn. General Co. v. Johnson,* 303 U.S. 77, 80-82 (1938). Another line of cases rejects a conceptualistic approach and tests the doing of business within a state by considering in addition to the place of contracting, the location of activity prior and subsequent to the making of the contract, and the degree of interest of the regulating state in the object insured. *Osborn v. Ozlin,* 310 U.S. 53, 66-67 (1940); *Hoopeston Canning Co. v. Cullen,* 318 U.S. 313, 316-19 (1943); *Travelers Health Assn. v. Virginia,* 339 U.S. 643, 647-49 (1950).

Between the decision of this Court in *Paul v. Virginia,* 75 U.S. (8 Wall.) 168 (1868), and the decision in *United States v. Southeastern Underwriters Assn.,* 322 U.S. 533 (1944), there was little restriction upon the regulation of the business of insurance by the several states. A state could, for example, impose any condition, including the obtaining of a license, as a prerequisite to the transaction of insurance business within the state by a foreign company. *Hooper v. California,* 155

U.S. 648, 655-56 (1895). The sole limitation upon the state's power to regulate the business of insurance existed under the due process clause of the Fourteenth Amendment. Under that clause, a state could regulate insurance business done within its borders, but could not regulate insurance business done outside the state. *Allgeyer v. Louisiana, supra,* 165 U.S. 578, 588, 590-91.

B. The Effect of the McCarran Act and the Todd Shipyards Case on the Definition of "Doing Business" Under the Due Process Clause.

In *United States v. Southeastern Underwriters Assn. supra,* 322 U.S. 533, this Court removed the business of insurance from state control by abandoning *Paul v. Virginia, supra,* 75 U.S. (8 Wall.) 168, and declaring the business to be interstate commerce. Congress promptly passed the McCarran Act in 1945 (15 U.S.C. §§ 1011-15), the purpose of which was to preserve existing and future state legislation regulating the insurance business without restriction by reason of the commerce clause. *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 429-31 (1946); *State Bd. of Ins. v. Todd Shipyards,* 370 U.S. 451, 452 (1962).

While Congress has plenary power to regulate interstate commerce, it is for the courts to determine whether state regulations are consistent with due process. Thus, Congress, in the McCarran Act, could not and did not attempt to define the due process limitations on the states' power to regulate and tax the business of insurance, but instead, specifically left this question for judicial determination under the controlling decisions of the United States Supreme Court. *State Bd. of Ins. v. Todd Shipyards, supra* at 455-56.

Todd was the first case arising on facts occurring after the passage of the McCarran Act which dealt with the problem of doing business within a state in a manner sufficient to justify regulation and taxation under the due process clause. The Texas statute involved in the *Todd* case imposed a tax of 5 per cent of gross premiums upon any person who purchased from an insurer not licensed in Texas a policy covering risks within the state, unless the policy was purchased through an agent licensed in Texas. The statute was thus virtually identical to those declared invalid in *Allgeyer, supra,* 165 U.S. at 579, and *St. Louis Compress, supra,* 260 U.S. at 347. In the face of these two cases, the Attorney General of Texas, in the lower courts and in this Court, was compelled to argue that *Allgeyer* and *St. Louis Compress* were no longer binding in view of *Osborn, supra,* 310 U.S. 53, and *Hoopeston, supra,* 318 U.S. 313. *State Board of Insurance v. Todd Shipyards Corp.,* 340 S.W. 2d 339, 343-44 (Tex. Civ. App. 1960); *State Board of Insurance v. Todd Shipyards Corp.,* 343 S.W. 2d 241, 242 (Tex. 1961); *State Bd. of Ins. v. Todd Shipyards, supra,* 370 U.S. at 453.

Because Congress had relied on the *Allgeyer, St. Louis Compress,* and *Conn. General* cases in fashioning the scheme of regulation contained in the McCarran Act, this Court, in *Todd,* declined to overrule those earlier cases, although reserving the right to do so. 370 U.S. at 456-57. In taking this position, the Court in no way criticized the *Osborn* or *Hoopeston* decisions.

It must be conceded that by virtue of the *Todd* decision the validity of state regulation of insurance must be tested by the principles of due process as they existed prior to the McCarran Act. 370 U.S. at 457.

The principles of due process announced before the McCarran Act include the principles of the *Allgeyer* line of cases, as well as the *Hoopeston* line of cases. It is the position of the State of California that the facts of the instant case bring it within the *Hoopeston* principles and that the *Allgeyer* principle is inapplicable. It is our position that *Allgeyer* applies where an insurance company does no act, by mail or otherwise, in the regulating or taxing state, and all that is involved is the voluntary act of a resident in procuring insurance from an out-of-state insurer, but that *Hoopeston* applies where, as in the instant case, the company engages in a continuous series of activities in the regulating state resulting in substantial contacts with the state and its residents.[1]

II.

Regulation by Wisconsin of the Solicitation and Negotiation in Wisconsin of Insurance Business Does Not Offend the Due Process Clause of Amendment Fourteen to the United States Constitution Even Though the Solicitation Is Sent Into Wisconsin by Mail From Another State.

A. The Solicitation and Negotiation of a Mail Transaction Occurs Where the Mail Is Received.

Historically, in considering transactions carried on entirely by mail, both federal and state cases hold that solicitation and negotiation take place where the mail is received. *United States v. Thayer*, 209 U.S. 39, 42, 44 (1908) (solicitation of campaign funds occurs where letter soliciting same is received); *In re Palliser*, 136 U.S. 257, 265-68 (1890) (interstate solicitation by mail may be punished in state of receipt as if personally

[1]See note 3, *infra*, p. 9 and accompanying text.

done there); *Rose v. State*, 62 S.E. 117 (Ga. Ct. App. 1908) (interstate solicitation by mail for sale of liquor constitutes the doing of liquor business where letter is received, and person so soliciting may be punished where letter is received); *Golden & Co. v. Justice Court*, 23 Cal. App. 778, 140 Pac. 49 (1914) (solicitation of liquor sales by mail constitutes doing of business where mail is received, and sender is liable for doing illegal business); *Commonwealth v. Long*, 1 Pa. County Ct. 190 (1885) (interstate mail order insurance solicitation is doing insurance business in state of receipt, and requires a license); *Locknane v. United States Savings & Loan Co.*, 44 S.W. 977, 978 (Ky. Ct. App. 1898) (interstate mail order loan is doing lending business in state of loan's receipt and requires a license); *People v. Sansom*, 37 Cal. App. 435, 173 Pac. 1107 (1918) (crime of forgery occurs where forged document received in interstate mail); *People v. Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881, 47 Cal. Rptr. 812 (1964), *appeal dismissed*, 382 U.S. 1 (1965) (interstate mail order small loan negotiation may be licensed under section 24200 of California Financial Code.)[2] See also *United States v. Steinberg*, 62 F. 2d 77, 78 (2d Cir. 1932). That the principle announced in the above cases has also been held applicable to insurance is shown by *Commonwelath v. Long, supra*, 1 Pa. County Ct. 190 (1885), and *Karvalsky v. Becker*, 29 N.E. 2d 560, 562 (Ind. 1940).

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[2]The Motion To Dismiss Appeal for lack of a substantial federal question in the *Fairfax* case was urged primarily on the basis of *Robertson v. California*, 328 U.S. 440.

B. In the Todd, Allgeyer, St. Louis Compress, and Conn. General Cases the Companies Did no Business in the Regulating State by Mail or Otherwise.

In the instant case there are many activities in Wisconsin by Ministers Life other than mail solicitation and negotiation, as pointed out at pages 3-7 of Appellee's Motion To Dismiss Appeal. We discuss the above mail solicitation cases to indicate that, historically, federal and state courts have had no difficulty in finding that a regular pattern of mail solicitation and negotiation in a state constitutes the doing of business where the mail is received, and if the mail results in the commission of a crime, *e.g.,* solicitation for the sale of alcohol or unauthorized insurance, the crime may be punished in the receiving state.

In embarking upon a discussion of the problems presented by the instant case, we think it is fair to say that *Allgeyer* did not hold that an insurance company is not doing business in a state when it regularly solicits and negotiates insurance there, whether by mail or otherwise. The *Allgeyer* Court did not reach this holding because the Court specifically stated that it was not "alluding to acts done within a state by an insurance company or its agents . . . which are in violation of the state statutes. . . ." 165 U.S. 578, 591. Nor was it discussing whether in the exercise of the police power a state could prohibit acts of insurance companies which conflict with state statutes. This issue "must be left for determination to each case as it arises." 165 U.S. 578, 590-91. The Court held only that a state, under the due process clause, could not prohibit one of its citizens from soliciting from a company and contracting for insurance with a company located in another state

while he remained within the state. 165 U.S. 578, 590-93. In reaching this decision the Court necessarily determined that a foreign insurance company is not doing business in a state where a citizen of that state writes to it in order to contract for insurance. Under such a circumstance the foreign company does no act in the state, and the Court, as above mentioned, specifically stated that its holding did not apply where the company did engage in acts in the state which violate state statutes.[8] The only act of any kind done in Louisiana by anyone in the *Allgeyer* case was the act of the resident in mailing a letter seeking insurance from the foreign company. No act, single or continuous, by mail or otherwise, was done in Louisiana by the insurance company from whom Mr. Allgeyer had obtained his insurance.

St. Louis Compress Co. v. Arkansas, supra, 260 U.S. 346, is a case on all fours with the *Todd* case. The Cotton Compress Company was a Missouri corporation licensed to, and doing, business in Arkansas. In Missouri, the company negotiated for and obtained fire insurance coverage for its property in Arkansas, from an insurer not licensed to do business in Arkansas. An Arkansas state imposed a 5 per cent premium tax.

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[8]This analysis of *Allgeyer* is directly supported by *Bothwell v. Buckbee, Mears Co.*, 275 U.S. 274, 276-77 (1927). *Bothwell* is authority for the proposition urged here: that a state can require a license when an out-of-state insurance company solicits insurance from a resident, even though it could not do so when the resident voluntarily writes to the out-of-state company to procure insurance, and the company does no act in the licensing state. The federal and state mail solicitation cases discussed above show that the act of solicitation by a foreign company can occur through the use of the mails as well as by personal contact. The Wisconsin Supreme Court cites *Bothwell* at 141 N.W. 2d 287, 291 n. 2.

on fire insurance premiums paid to companies not authorized to do business in the state, whereas premiums paid to authorized companies were taxed at the rate of 2 per cent. The application of the statute to the facts there involved was held in violation of the due process clause. The decision states, 260 U.S. at 349:

> "This case is stronger than that of Allgeyer in that here no act was done within the State, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside. . . ."

As in the *Allgeyer* case, the insurer in the *St. Louis Compress* case carried on no activities within the taxing state, by mail or otherwise.

The third case repeatedly mentioned in the *Todd* decision is *Conn. General Co. v. Johnson, supra,* 303 U.S. 77. There the Court struck down a California statute taxing premiums paid by a California licensed insurer to a foreign corporation, also licensed in California, for reinsurance of policies insuring the lives of California residents. The reinsurance contracts were made in Connecticut where the premiums were paid and where losses were payable. The reinsurance involved no action within California, not even the adjustment of claims. Upon those facts, the Court held that the due process clause precluded California from exercising any power to tax the premiums received by the reinsurer.

C. Hoopeston and Todd Discussed and Compared.

Viewed against the *Allgeyer* line of cases, where the company did nothing in the regulating or taxing state, and the previously cited federal and state cases in which mail solicitations from out of state were held to be doing business and, therefore, capable of being licensed and regulated in the receiving state, the decision in the *Hoopeston* case follows as a matter of course. *Hoopeston Canning Co. v. Cullen, supra,* 318 U.S. 313.

In *Haopeston,* residents of New York applied to, and after local investigation of the risks, if accepted, became members of an Illinois insurance association. The application for insurance and other necessary forms were signed by the applicant in New York and mailed to the association in Illinois. If the application and other forms were accepted, the contract of insurance was executed by the association and issued in Illinois, and sent by mail to the policyholder in New York. The association claimed that New York, under the due process clause, could not require it on the above facts to obtain a New York certificate of authority "Since the contracts of insurance are signed in Illinois and losses are paid by checks mailed from that state, the associations do no business in New York. . . ." 318 U.S. 313, 316.

In upholding the right of the State of New York to require the Illinois company to obtain a certificate of authority, this Court stated that:

(1) The power of a state to regulate an insurance transaction does not depend on a conceptualistic theory of where a contract is signed or to be performed. 318 U.S. at 316-17.

(2) An insurance company may be transacting insurance business in a state though it is "scrupulously careful to see that not a single contract is ever signed within that state's boundaries. . . ." 318 U.S. at 317.

> "We conclude that in determining whether insurance business is done within a state for the purpose of deciding whether a state has power to regulate the business, considerations of the location of activity prior and subsequent to the making of the contract, . . . of the degree of interest of the regulating state in the object insured, and of the location of the property insured are separately and collectively of great weight. . . ." 318 U.S. at 319.

Applying the *Hoopeston* criteria to the instant transactions, it is clear that only the formal acceptance of the insurance contract and the mailing of checks, and other forms, take place in the home state of the company. By virtue of the fact that the insured and his family reside in Wisconsin, the solicitation and negotiation of the contract occurs there, and the contract forms are executed there. Wisconsin is the center of activity in the instant insurance transactions both prior to and after the acceptance of the contract in the foreign state. Quite obviously, if the foreign company was free to disregard Wisconsin's regulatory requirements, if it did not honor its obligations to the policyholder, it is Wisconsin insureds who would be harmed. If Wisconsin is unable to regulate the foreign insurer doing business with an insured within Wisconsin, the result would inevitably be that even the system for control of purely local insurance would break down, as all those who wish to evade or avoid Wisconsin's laws need do is to establish an office and carry on their business by mail

from across the state line. See *Robertson v. California,* 328 U.S. 440, 458-60 (1946). Neither the *Todd* decision nor the due process clause, we submit, dictates such a result.

Comparing the *Todd* decision to *Hoopeston,* it is readily seen that *Todd* flows from the *Allgeyer* and *St. Louis Compress* rule that a state cannot regulate or tax an insurance transaction where the company does no act, by mail or otherwise, in the regulating or taxing state. As said by this Court in *Todd* (370 U.S. at 454-55):

> "The insurance transactions involved in the present litigation take place entirely outside Texas. The insurance, which is principally insurance against loss or liability arising from damage to property, is negotiated and paid for outside Texas. The policies are issued outside Texas. All losses arising under the policies are adjusted and paid outside Texas. The insurers are not licensed to do business in Texas, have no office or place of business in Texas, do not solicit business in Texas, have no agents in Texas, and do not investigate risks or claims in Texas.
>
> "The insured is not a domiciliary of Texas but a New York corporation doing business in Texas. Losses under the policies are payable not to Texas residents but to the insured at its principal office in New York City. *The only connection between Texas and the insurance transactions is the fact that the property covered by the insurance is physically located in Texas.*" (Emphasis added.)

Therefore, when *Todd* states that the McCarran Act established the *Allgeyer* line of cases as the outside limit

within which state regulation of insurance must be contained (370 U.S. at 456), this Court was reiterating the *Allgeyer* rule that a state cannot regulate a transaction if the only act occurring within the state is the act of an insured in writing to a foreign company in order to obtain insurance on his property. *Todd,* like the *Allgeyer* line of cases, involved a situation in which, after a meticulous review of the contacts Texas had with the particular transaction there involved, this Court determined that the insurance company had done no act in the State of Texas.

The instant case is governed by *Hoopeston* because the company does many acts in the State of Wisconsin (Motion to Dismiss, pp. 3-11), not the least of which is the regular solicitation and negotiation of insurance at the only place where such solicitation and negotiation can be effective—at the home of the insured, in Wisconsin. The state's interest in regulating these life insurance transactions with its residents must surely be primary over the interest which any other state might have in the transaction. *Watson v. Employers Liability Assur. Corp.,* 348 U.S. 66, 71-73 (1954); *Robertson v. California, supra,* 328 U.S. 440, 447, 457, 459-61 (1946).

D. Minnesota Commercial Men's Assn. v. Benn Discussed and Distinguished.

Appellants rely on an argument based upon *Minnesota Commercial Men's Assn. v. Benn,* 261 U.S. 140 (1923), that case law prior to 1945 had specifically determined that a state could not license or regulate a mail order insurance transaction. Thus, the argument goes, the state's inability to regulate a mail transaction

was incorporated into the McCarran Act. *Id.* Statement, page 16.

Benn was a service of process case. It involved no substantive licensing or regulation in the state in which the action arose. Since only "minimal" contacts are needed with the forum state in order to justify service of process upon a foreign corporation under the due process clause, and in *Benn* the service of process was found to violate due process, *ipso facto,* the argument goes, the state could not, under the due process clause, regulate or license the mail transaction since regulation and taxation require more substantial contacts.

The above argument would have some validity only if it could be said that the Association in *Benn* solicited insurance or did some other act in the forum state by mail or otherwise. We would then have a fact situation different than in the *Allgeyer* line of cases in which the insurance transactions were not initiated by the foreign companies, nor did the companies do any act in the forum state. But *Benn* did not differ from *Allgeyer.* In *Benn,* all of the company's offices and agents, and all of its activities, were in Minnesota. 261 U.S. at 142-43. The only act occurring in Montana, the forum state, was the act of a member of the Association soliciting new members. 261 U.S. at 145. If the member had been an agent of the company, the result would have been different,[4] but the Court said:

> "we think it cannot be said that the Association was doing business in Montana merely because one or more members, *without authority to obligate it,* solicited new members. . . ." 261 U.S. at 145. (Emphasis added.)

[4] *Bothwell v. Buckbee, Mears Co., supra,* 275 U.S. 274, 276-77 (1927).

While the Association was not bound by the acts of its members, it would have been bound if it had transported itself by mail into Montana and had itself solicited new members. This is the precise teaching of the federal and state mail order solicitation cases cited above.

The *Benn* case was effectively overruled in 1950 in *Travelers Health Assn. v. Virginia,* 339 U.S. 643, 647-49 (1950). So, while *Benn* is like *Allgeyer* and is therefore consistent with the resolution of *Allgeyer* and *Hoopeston* suggested herein, we have a direct authority abandoning the *Benn* decision in favor of the *Hoopeston* approach.[5] In overruling *Benn,* the Court in *Travelers Health* said (339 U.S. at 647-48):

> "But where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state. And in considering what constitutes 'doing business' sufficiently to justify *regulation* in the state where the effects of the 'business' are felt, the narrow grounds relied on by the Court in the Benn case cannot be deemed controlling.
>
> ". . .
>
> ". . . 'great weight' [must be accorded] to the 'consequences' of the contractual obligations in the

[5]The decision in *Travelers Health* answers appellant's argument that the *Benn* rule (even if it stood for the proposition for which they cite it) was incorporated or frozen inexorably into the McCarran Act. *Id.* Statement, p. 16.

> state where the insured resided and the 'degree of interest' that state had in seeing that those obligations were faithfully carried out. . . ." (Emphasis added.)

Reading the holding in *Travelers Health Assn. v. Virginia, supra,* in conjunction with this Court's holding in *F.T.C. v. Travelers Health Assn.,* 362 U.S. 293, 298-99, 301-02 (1960), and the federal and state mail order solicitation and negotiation cases discussed above we think it is clear that the McCarran Act specifically supports regulation of the mail order insurance business by the state into which the mail is regularly sent by a foreign company. Under the McCarran Act, a state has the power to regulate all aspects of insurance business done within its borders, including (if state law specifically and effectively so provides) the regulation of deceptive mail advertising sent into the state. Since a state can regulate this type of deceptive advertising, and thereby displace regulation by the Federal Trade Commission, it follows that in areas other than advertising, where no federal jurisdiction is preserved, a state can regulate the insurance business solicited by such advertising, and of which the advertising is an essential part. Since the McCarran Act recognizes state regulation of mail advertising, it must also recognize the regulation of the business transacted within the state by means of such advertising, for it is in the state "where the business activities have their operative force." *F.T.C. v. Travelers Health Assn., supra,* 362 U.S. 293, 301-02 (1960).

CONCLUSION.

Because the appellant has failed to present a substantial federal question, it is respectfully requested that the Motion To Dismiss be granted.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General,
H. WARREN SIEGEL,
Deputy Attorney General,
Attorneys for Amicus Curiae.

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IN THE

Supreme Court of the United States

October Term, 1966

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and

BRONSON C. LA FOLLETTE,
Attorney General of the State of Wisconsin,
Appellees.

On Petition for Rehearing of Order Dismissing Appeal from the Supreme Court of the State of Wisconsin

BRIEF FOR THE CHURCH INSURANCE COMPANY AND THE CATHOLIC RELIEF INSURANCE COMPANY OF AMERICA AS *AMICI CURIAE*

CLOYD LAPORTE,
40 Wall Street,
New York, New York 10005.
Attorney for The Church Insurance Company and The Catholic Relief Insurance Company of America as amici curiae.

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD,
40 Wall Street,
New York, New York 10005.
Of Counsel.

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The Interest of the *Amici Curiae*

The Church Insurance Company and The Catholic Relief Insurance Company of America, with the consent of both parties, submit this brief as *amici curiae* in support of the appellant, Ministers Life and Casualty Union.

The Wisconsin Supreme Court judgment appealed from upholds the validity of a Wisconsin statute which asserts

power to regulate and tax insurance contracts with Wisconsin residents, made outside Wisconsin through use of the mails by insurers not licensed in Wisconsin and having no offices or agents therein.

The Church Insurance Company and The Catholic Relief Insurance Company of America conduct their businesses principally by mail without the use of agents, thus effecting substantial savings in costs and premiums. The Church Insurance Company is a nonprofit New York insurance corporation owned by The Church Pension Fund, the pension system for the clergy of the Protestant Episcopal Church. Since its incorporation in 1929 it has been engaged in insuring churches and other property in the Protestant Episcopal Church and affiliated organizations against fire and allied hazards. Its home office is in New York and it is regulated under the New York Insurance Law.

The Catholic Relief Insurance Company of America is a nonprofit Nebraska insurance corporation engaged in insuring properties of the Roman Catholic Church. Its home office is in Omaha, and it is regulated under the Nebraska Insurance Law. It is owned by The Catholic Mutual Relief Society of America, a religious and benevolent society organized in 1889 by members of the American Roman Catholic hierarchy and incorporated under the laws of Nebraska in 1896 for the purpose of providing relief for properties of the Roman Catholic Church in the event of disaster, calamity or need.

The Church Insurance Company insures church properties in 27 states in which it is not licensed. In 1965 its premium income from these 27 states ranged from $37,239.98 from Missouri down to $3.20 from Alaska. The Catholic Relief Insurance Company of America insures church properties in 36 states in which it is not licensed. In 1965 its premium income from these 36 states ranged from $42,037.29 from Montana down to $11.06 from Ver-

mont. The Wisconsin decision here appealed from would subject these companies to regulation and taxation in these states. As was pointed out in the brief submitted to this Court on behalf of these companies as *amici curiae* in *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962), because of the limited number of church properties in these states and the consequent limits on any increase in the volume of insurance, the practical effect of subjecting these companies to the jurisdiction of the states in which they are not licensed would be to prevent the companies for the foreseeable future, in most if not all of those states, from writing insurance on church properties located there, to the detriment of the dioceses, parishes and religious orders in those states.

ARGUMENT

The Judgment Appealed from Presents a Substantial Federal Question

The McCarran-Ferguson Act of 1945* granted to the states power to regulate and tax the business of insurance, a power the states had been traditionally thought to possess prior to the decision in *United States* v. *South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944). This grant was confined by Congress, however, within the jurisdictional limitations which had previously been set out by earlier constitutional decisions of this Court. This Court so held in *State Board of Insurance* v. *Todd Shipyards Corp., supra.*

Those earlier decisions were *Allgeyer* v. *Louisiana,* 165 U.S. 578 (1897), *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U.S. 346 (1922), and *Connecticut General Life Insurance Co.* v. *Johnson,* 303 U.S. 77 (1938). They were based on the principle that a state had no jurisdiction to regulate or tax insurance contracts made outside the state by its

---

* 59 Stat. 33 (1945), 15 U.S.C. §§ 1011-1015 (1964).

residents. It was that principle which Congress in effect incorporated in the McCarran-Ferguson Act as a statutory limitation on the states' power to regulate and tax the business of insurance. *State Board of Insurance* v. *Todd Shipyards Corp., supra* at 455-56.

Under that principle, use of the mails did not give a basis for jurisdiction. Thus in *Allgeyer* v. *Louisiana, supra,* the Court said (165 U.S. 578, at 592-93):

> "The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it. *Milliken* v. *Pratt,* 125 Mass. 374; *Tilden* v. *Blair,* 21 Wall. 241. The contract in this case was thus made.
>
> * * * * *
>
> "Any act of the state legislature which should prevent the entering into such a contract, or the mailing within the State of Louisiana of such a notification as is mentioned in this case, is an improper and illegal interference with the conduct of the citizen, although residing in Louisiana, in his right to contract and to carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the State."

In reliance on the principle of those cases, many small insurance companies have traditionally conducted business by mail with residents of other states, economically and without the use of agents or the expense of agents' commissions or of multi-state licensing or taxation. In *Todd* the Court made explicit mention of the severe impact that a change in the old rule would have on such companies.*

The judgment of the Wisconsin Supreme Court appealed from presents a substantial Federal question, namely, whether the Wisconsin statute there sustained exceeds the

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* 370 U.S. 451, at 457.

power granted to the states by Congress in the McCarran-Ferguson Act as construed in *Todd*. It is submitted that it does, and that the Court should hear this appeal.

Conclusion

Probable jurisdiction should be noted, and the judgment below from which this appeal is taken should be reversed.

Respectfully submitted,

CLOYD LAPORTE,
Attorney for The Church Insurance Company and The Catholic Relief Insurance Company of America as amici curiae.

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD,
Of Counsel.

December 21, 1966.

CERTIFICATE OF SERVICE

I, CLOYD LAPORTE, attorney for The Church Insurance Company and The Catholic Relief Insurance Company of America as *amici curiae* herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of December, 1966, I served copies of the foregoing Brief for the said *amici curiae*, pursuant to Rule 33 of the Rules of the Supreme Court, by causing copies thereof to be deposited in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record for the appellant at Langdell Hall, Cambridge, Massachusetts 02138, and with airmail postage prepaid, addressed to counsel of record for the appellees at Room 114 East, State Capitol, Madison, Wisconsin 53702.

Cloyd Laporte

CLOYD LAPORTE,

Attorney for The Church Insurance Company and The Catholic Relief Insurance Company of America as amici curiae.

PETITIO

REHEA

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR A REHEARING

ERWIN N. GRISWOLD
Langdell Hall
Cambridge, Massachusetts
Counsel for Appellant

FRANK A. ROSS
1 South Pinckney Street
Madison, Wisconsin
Of Counsel

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR A REHEARING

The brief of the State of California, as amica curiae, was filed without any notice to the appellant, and without any opportunity for a reply. Moreover, it was felt, obviously mistakenly, that the brief emphasized both the importance and the substantiality of the questions involved. In this situation the appellant feels that it should present this further and fuller argument for the consideration of the Court.[1]

[1] Since the Appellant's Jurisdictional Statement and Reply Brief were filed a comprehensive study of the history, background, and problems in this area has been published, demonstrating the widespread interest in, and importance of the questions here raised. Hanson and Obenberger, "Mail Order Insurers: A Case Study in the Ability of the States to Regulate the Insurance Business," 50 Marquette L. Rev. 175-345 (1966).

I

CONGRESS, THOUGH WELL INFORMED, HAS REPEATEDLY REFRAINED FROM AMENDING THE STATUTE.

For many years, both before and after the enactment of the McCarran-Ferguson Act in 1945, Congress has been asked to enact special legislation, clearly within its powers, which would have restricted the business of mail order insurance. Congress has never enacted such a statute.

For a number of years, these bills — well-known to persons involved in the insurance business or in insurance regulation — were known as the Hobbs bills, since they were introduced into the House of Representatives by Congressman Hobbs of Alabama. The first such bill that we have been able to find is H.R. 6452, 74th Congress, 1st Session — "Making it unlawful to use the mails to solicit or effect insurance or collect and transmit insurance premiums in any state without complying with the insurance laws thereof." This Bill was introduced by Congressman Hobbs on March 6, 1935, and was referred to the Committee on Post Office and Post Roads. 79 Cong. Rec. 3066.

On May 24, 1935, Congressman Hobbs introduced another Bill, H.R. 8206 — "Making it unlawful for any person, firm, association or corporation not expressly excepted from the operation of the act by the provisions thereof, to use the mails to solicit or effect insurance or collect or transmit insurance premiums in any state without complying with the insurance laws thereof." This, too, was referred to the Committee on Post Office and Post Roads. 79 Cong. Rec. 8213.

Neither Bill was ever reported out of Committee.

Similar Bills were introduced in following years.

In 1943, Congressman Hobbs introduced H.R. 687, 78th Congress, 1st Session—"Making it unlawful to use the mails to solicit or effect insurance or collect and transmit insur-

ance premiums in any state without complying with the insurance laws thereof." This Bill, too, was referred to the Committee on Post Office and Post Roads. Hearings were held on this Bill on April 12 and 13, 1943, which were printed. Early in the Hearings Congressman Hobbs himself testified with respect to the Bills which he introduced in 1935. Hearings, p. 4. He stated that Hearings were held "over 5 days in March and April 1935." He then went on to say (Hearings, p. 4):

> MR. HOBBS. After extensive hearings the opposition created enough doubt as to the wisdom of enacting the bill, to cause the committee to direct me to introduce alternative bills, one providing for Federal regulation in a very mild form, the other the original bill as amended; and I am perfectly willing to amend this bill in any way you gentlemen may see fit. Of course, I prepared and introduced the two bills, but neither was approved by the subcommittee or the full committee, although most of the members of the committee were in sympathy with the objective. On April 19, 1935, the subcommittee under the leadership of Mr. Ashbrook unanimously recommended that H.R. 6452, then under consideration, be not favorably reported, and that ended the matter.

Numerous witnesses testified against the bill in 1943. They represented, among others, the National Mutual Church Insurance Company, Chicago, Illinois, the Associated Factory Mutual Fire Insurance Companies, the Ministers Life and Casualty Union, the Church Pension Fund, the Church Life Insurance Corporation, the Church Properties Fire Insurance Corporation, and the Teachers Insurance and Annuity Association of America. One of the witnesses, representing two of these companies, was former Congressman Oscar Youngdahl, of Minnesota. His testimony included the following (Hearings, pages 38, 39):

> I believe these companies have a very definite place in the insurance field, because they are serving a class of people who cannot spend much money for insurance premiums. If we eliminate them, we will deprive many people in America of that type of beneficial service.

Other legitimate companies could not perform a similar service because they will be affected in the same way if this legislation passes. There are many other companies who operate in the same manner and are performing a splendid service. (P. 38.)

* * * * *

So far as this proposed legislation is concerned, I am wondering whether our present law and the cooperation between the commissioners of insurance of the various States is not sufficient and would not obtain the same results, and it would be better to follow it rather than to pass legislation that might exclude a legitimate company from doing business.

It was said yesterday that we could pass a bill with sufficient exclusions, and if some company were included who should not be included, the law could be amended. In answer to that, may I say that in the meantime irreparable damage might be done before the amendment could be effective. It would be difficult to provide enough exclusions to protect every concern or person that might be affected by this proposed law. (P. 39.)

Mr. Youngdahl concluded as follows (p. 39):

MR. YOUNGDAHL. Everyone is susceptible to misrepresentation and in our weaker moments some of us may become victims. However, there are many very reliable concerns in America performing a real insurance service based on the principle of cooperation and mutual helpfulness. To eliminate these companies by legislation would be depriving the American people of a real service.

I believe the bill before you, if passed, might do more harm than good and would be a dangerous invasion in a field that is now adequately protected.

Following these Hearings, no Bill was reported out by the Committee on Post Office and Post Roads.

In 1955, Congressman Ford of Michigan introduced two Bills, similar to the earlier Hobbs Bills. These were H. R. 2393 and H. R. 6916, 84th Congress, 1st Session. And Senator Cotton of New Hampshire introduced a similar Bill in

the Senate. S. 981, 84th Congress, 1st Session. All of these Bills were referred to Committees. None was reported out.

Similarly, in 1957 Congressman Christopher introduced H. R. 116 and H. R. 7087, and Congressman Rhodes introduced H. R. 5041, 85th Congress, 1st Session, all with similar objectives. All of these Bills were referred to Committees and none was reported out.

In 1959, Congressman Rhodes introduced H. R. 9052, 86th Congress, 1st Session. This, too, was referred to the Committee on Post Office and Post Roads, and was not reported out.

In addition to these Bills, substantial Hearings were held by the Senate Judiciary Committee under the Chairmanship of Senator Langer in 1955. These Hearings were held with the aid of a staff, and were held in various cities in the country. Congress took no action either to subject mail-order insurance to further federal regulation or restriction or to grant to the States any increased authority to tax or to regulate mail-order insurance.

In this situation, it is plain that Congress was well-informed, and that not enough sentiment arose to make it seem desirable to enact legislation which would change the situation as it was then understood to be. This matter is fully discussed in an article by Charles C. McCarter, then Assistant Attorney General of Kansas, entitled "Recent Misleading and Deceptive Mail Order Accident and Health Insurance Policies and Advertising," published in 23 Insurance Counsel J. 82 (1956). Mr. McCarter said that "to pass legislation which requires all companies to act in a given way for the purpose of eliminating the deceptive practices of a few companies is to over legislate. Legitimate company operations are hampered needlessly." 23 Insurance Counsel J. at 100.

II

THE LEGISLATIVE HISTORY OF THE McCARRAN-FERGUSON ACT IS CLEAR, AND HAS BEEN ACCEPTED IN PRACTICAL CONSTRUCTION.

Following this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944), Congress did enact the McCarran-Ferguson Act. This was the result of extensive consideration by Congress, beginning in 1944. Hearings were held in 1944, which were published in five parts. The House of Representatives passed H. R. 3270 on June 22, 1944. This bill was never finally passed by the Senate.

In 1945, bills were introduced in both House and the Senate. The Senate passed S. 340 with amendments, and it went on to the House of Representatives, where it was referred to the House Committee on the Judiciary. It was reported to the House on February 13, 1945. House Report No. 143, 79th Congress, 1st Session. This Report contains the following passage at page 3:

> It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U.S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U.S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U.S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks

within the State or to regulate such transactions in any way.[2]

The Senate bill passed the House with amendments. When this bill came back to the Senate, the Senate asked for a conference. The bill as reported by the conference committee was eventually accepted by both the House and the Senate. In making the conference report to the Senate, Senator McCarran made the following statement at the beginning of his presentation (91 Cong. Rec. 1442):

> Mr. President, let me make one statement which I think should be placed in the RECORD here. It should be stated here, as it was stated in the report which went to the House, from which I read that —
>
> > It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject, always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U.S. 578); *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U.S. 346); and *Connecticut General Insurance Co.* v. *Johnson* (303 U.S. 77).

The two statements are identical, except that Senator McCarran did not read the last clause of the House Report.

This language, used in both the House and the Senate, is obviously a crucial element in the legislative history of the statute. The language was carefully chosen, and it should be examined in the same way. Moreover, in examining this language, it should be put in its setting, namely the con-

[2] In a previous report, made on February 8, 1945, the House Judiciary Committee reported on H.R. 1973. House Report No. 68, 79th Congress, 1st Session. This Report contains (p. 2) the same language as that in House Report No. 143.

sideration of the McCarran-Ferguson Act which was designed to restore state taxation and regulation of the insurance business to the place it had before this Court's decision in the *Southeastern Underwriters* case. The statement, in both the House and the Senate, is specific that: "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that *which they had been held to possess* prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case." (Italics added.) In other words, the states were restored (with respect to taxation and regulation) to the position which they held in 1944, but no further powers were granted to them. For this purpose, it is important to observe that at that time no case had held that a non-qualified mail order insurance company was subject to taxation and regulation in any state other than its state of domicile, and the practice was thoroughly established in the states that such non-qualified companies were not subject to taxation and regulation.

This is explicit in the Proceedings of the National Association of Insurance Commissioners, and in the reports of its Committee on Unqualified Insurers. It is explicit in the hearings of the Federal Trade Commission held in 1948 and 1949 preceding the adoption by that Commission of its Trade Practice Rules relating to "advertising and sales promotion of mail order insurance." These were published in the Federal Register for February 3, 1950 — 15 Fed. Reg. 599.

It was explicit in the hearings held by Senator Langer for the Senate Judiciary Committee in 1955, from which no legislation resulted.

Finally, such an understanding and practical construction is the very foundation of this Court's decision in *Federal Trade Commission* v. *Travelers Health Association,* 362

U.S. 293 (1960). The whole question in this case was whether the Federal Trade Commission had power to regulate mail order insurance in view of the McCarran-Ferguson Act. This Court held that the Federal Trade Commission had such power because the states did not have effective power to regulate such insurance. The Court quoted (362 U.S. at 297) from its Opinion in *Federal Trade Commission* v. *National Casualty Co.*, 357 U.S. 560, 564 (1958), where it referred to "interstate insurance practices which the states cannot for constitutional reasons regulate effectively."

It is hard to conceive of a situation where the practical construction of a statute was more clearly established, over a long period of time. It was established through the legislative history in both Houses of Congress. It was established by one of our major federal administrative agencies, the Federal Trade Commission. It was established by the action and understanding of the insurance officials of the states. And, finally, this practical construction was confirmed by this Court in *Federal Trade Commission* v. *Travelers Health Association*, and also in *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 45 (1962).

We have become accustomed to changing construction of constitutional provisions, and this is illustrated in many decisions of this Court. Constitutional doctrines grow and develop, ebb and flow. But the question involved in this case is essentially one of statutory construction, namely, what did Congress mean when it passed the McCarran-Ferguson Act in 1945? On such a matter, legislative history and practical construction over a period of many years should be controlling. If there is to be a change in the law, Congress can make it, and Congress is the body which should make it. Congress can well consider all of the competing considerations, and can extend the powers of the states to tax and regulate mail order insurance if it wants to do so. As we have shown, the question has been presented to Congress, on several occasions, and Congress has refrained from any action.

III

THE COMMONLY ACCEPTED LIMIT ON THE POWERS OF THE STATES, ACCEPTED OVER MANY YEARS, AND THE PRACTICAL CONSTRUCTION OF THE McCARRAN-FERGUSON ACT FOR MORE THAN TWENTY YEARS, SHOULD BE CONTROLLING ON THE MEANING OF THE STATUTE.

The practical construction is clear, and long continued. It is found in the action of Congress, in the inaction of Congress, in this Court's decisions in the *Travelers Health Association* and the *Todd Shipyards* cases, and in the common understanding of the insurance industry and the state insurance officials.

The situation is not essentially different from that involved in *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953), where this Court said (p. 357):

> Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. . . . We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.

The *Toolson* case was cited and relied on by this Court in *State Board of Insurance* v. *Todd Shipyards,* 370 U.S. 451, 457 (1962), dealing with a very closely analogous question involving the McCarran-Ferguson Act. The Court there said:

> But the policy announced by Congress in the McCarran-Ferguson Act was one on which the industry had reason to rely since 1897, when the *Allgeyer* decision was announced; and we are advised by an *amicus* brief how severe the impact would be on small insurance companies should the old rule be changed. When, therefore, Congress has posited a regime of state regulation on the continuing validity of specific prior decisions (see *Federal Trade Comm'n* v. *Travelers Health Assn.,* 362 U.S. 293, 301-302), we should be loath to change them.

The amicus brief to which reference is made in the *Todd Shipyards* opinion was filed on behalf of Church Fire Insurance Corporation (now Church Insurance Company) and Catholic Relief Insurance Company, both of which do business on the same basis as the Appellant here. These are the companies to which this Court specifically referred when it noted "how severe the impact would be on small insurance companies should the rule be changed." 370 U.S. at 457. That impact was deemed to be controlling on the question of statutory construction in 1962 when the *Todd Shipyards* case was decided. That impact will be no less today. It is hard to see how there is any basis for changing the construction which was arrived at in 1962 with specific reference to these "small insurance companies," both of which do business on the same basis as the Appellant.

IV

No decision of this Court, before or after the McCarran-Ferguson Act has sustained regulation or taxation of a mail-order company not qualified in the state.

In the brief filed in this case by the State of California, it is contended that the present case is governed by "Another line of cases" (California Br. 3), and *Osborn* v. *Ozlin,* 310 U.S. 53 (1940), *Hoopeston Canning Co.* v. *Cullen,* 318 U.S. 313 (1943), and *Travellers Health Assn.* v. *Virginia,* 339 U.S. 643 (1950), are cited.

None of these cases is relevant to the present case. The first two involved companies which *had qualified* to do business in the state which sought to regulate them. In other words, the question raised in each case related to the power of the state over a company which had taken affirmative steps to accept the state's jurisdiction. Neither of these two cases involved an *unqualified insurer,* that is, a company which had not accepted the state's jurisdiction.

Osborn v. *Ozlin* involved "foreign corporations authorized to do casualty and surety business in Virginia." 310 U.S. at 60.

Hoopeston Canning Co. v. *Cullen* involved companies which "have been annually licensed to do business in New York since 1930." 318 U.S. at 315. The petition filed in the trial court in that case alleged (R. 8, No. 358, October Term, 1942):

> "That said Canners Exchange Subscribers at Warner Inter-Insurance Bureau ever since their compliance with the aforesaid laws have, and continue so to be, licensed as inter-insurers in said state."

This allegation was admitted in the state's Answer (R. 16, No. 358, October Term, 1942). See also R. 12 and 22, for corresponding allegation and answer in an associated case. That the companies were licensed in New York was emphasized in the opening statement of counsel. R. 39-40. The trial court specifically found that the companies "have been, and now are, licensed as inter-insurers in the State of New York." R. 123-124, 140.

Travellers Health Association v. *Virginia* is a service of process case, and wil be discussed with other cases of this sort in the next Section of this Petition.

Thus it is clear that no decision of this Court, either before or after the McCarran-Ferguson Act, has ever held that a State had power to regulate or to tax a non-resident mail-order insurance company which *had not qualified* to do business in the state. For twenty years after the enactment of the McCarran-Ferguson Act the question did not arise because it was commonly accepted by all concerned that the states had no power to tax or to regulate in such cases. This understanding was confirmed by the underlying bases of this Court's decisions in *Federal Trade Commission* v. *Travellers Health Association*, 362 U.S. 293 (1960), and in *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962).

The distinction is not a merely artificial or verbal one, as the development of the insurance business in this area clearly shows. Moreover, as indicated above, it is a distinction which Congress has clearly recognized, and has repeatedly refrained from changing.

Finally, it is precisely the distinction which this Court made in *Compania General de Tabacos* v. *Collector of Internal Revenue,* 275 U.S. 87 (1927). In that case, two policies of insurance were involved, both entered into, and payable, outside of the Philippine Islands. One of the companies was qualified to do business in the Philippines, and the other was not. This Court held that the Philippine Government could tax the policy issued by the qualified company, and could not tax the policy issued by the company which had not qualified. This decision has entered into the fabric of the law in this area, and is a part of the background, wholly consistent with the explicit statements of Congress in the legislative history of the McCarran-Ferguson Act, which should enter into the construction of that statute.

V

DECISIONS WITH RESPECT TO SERVICE OF PROCESS ARE IRRELEVANT SINCE THE MCCARRAN-FERGUSON ACT BY ITS TERMS REFERS TO "REGULATION" AND "TAXATION" AND FIXES THE POWERS OF THE STATES ON THESE MATTERS AS THEY STOOD IN 1945.

Over the past twenty-one years, and since the enactment of the McCarran-Ferguson Act, there has been considerable development in our law of jurisdiction of courts, and this Court has upheld under the due process clause statutes which have provided for service of process and jurisdiction of courts in situations beyond that of the law as earlier understood. Perhaps the leading one of these cases is *International Shoe Co.* v. *Washington,* 326 U.S. 310, which was decided on December 3, 1945. Two more recent cases

have both involved insurance companies. *Travellers Health Ass'n* v. *Virginia,* 339 U.S. 643 (1950), referred to above, and *McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1957).

We have no quarrel with any of these cases. They are excellent examples of the growth and development of *constitutional* doctrine, and they may well indicate that the states could expand their powers to tax and to regulate if Congress, in the exercise of its power to regulate commerce, chose to grant such powers to the states. But Congress has clearly indicated its intention not to extend the powers of the states beyond what they were in 1945, as far as taxation and regulation are concerned.

The McCarran-Ferguson Act makes no reference to service of process or to jurisdiction of courts, and thus does not in any way interfere with the development of the law in those areas as far as insurance companies are concerned. But the McCarran-Ferguson Act does deal expressly with "taxation or regulation," *ipsissimis verbis,* and Congress expressly indicated its intention that the grant of power which it made to the states should not "clothe the States with any power to *regulate or tax* the business of insurance *beyond that which they had been held to possess*" (italics added) in 1944 when the *South-eastern Underwriters* case was decided. Thus Congress has imposed a still-stand on taxation and regulation by the states, though it has made no such limitation with respect to service of process and jurisdiction of courts.

Consequently, service of process cases are quite irrelevant as far as the present question is concerned. The law in that area is free to develop as it may. But the allocation of power to the states to tax or to regulate insurance business done by mail is wholly within the control of Congress, and Congress has made it plain that it intends that that power be fixed, and not subject to expansion or change

except as Congress chooses. Congress has made no change, and that should be controlling here.

That this has not been wholly inadvertent on the part of Congress is illustrated by the materials given above in Point I, and also by reference to the Act of September 14, 1959, Pub. L. 86-272, 73 Stat. 555 (U.S.C., Title 15, secs. 381-384; the text of sec. 381 is set out in the Appendix). By this statute Congress has shown its concern that interstate business, without an establishment in the state, conducted by the "soliciation of orders . . . which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State," should not be subject to local state taxation. This clearly refers to mail-order business, with the addition of local solicitation. *Cf. National Bellas Hess, Inc.* v. *Department of Revenue*, No. 241, October Term, 1966, in which Probable Jurisdiction has been noted. This whole question has been the subject of extensive investigation by Committees of Congress, pursuant to the express mandate of Congress. This statute clearly evidences the understanding and temper of Congress. If mail-order sales of tangible personal property are not to be subject to local taxation, it is hard to believe that Congress contemplates that mail-order insurance operations should be so taxed, particularly when Congress has been explicit in saying that the states should not have such a power unless "they had been held to possess" this power in 1944 — which clearly they never had.

VI

MAIL-ORDER COMPANIES ARE SUBJECT TO SUBSTANTIAL AND ADEQUATE REGULATION.

There may be concern that mail-order insurance will be the subject of abuse, and that it will be "above the law" unless it is subject to state regulation. But this is clearly not the case.

Mail-order insurance is, in fact, subject to many, and effective, controls:

1. *Fraud orders by the Post Office Department.* If a mail-order insurance business is conducted in a fraudulent manner, it can be readily controlled by having its access to the mails stopped through a Post Office fraud order. This can be a very effective remedy, and it can be put into effect by administrative action. In some cases, the Post Office issues "stop" orders, under which mail is held, pending the determination whether a fraud order should be issued. See McCarter, "Recent Misleading and Deceptive Mail Order Accident and Health Insurance Policies and Advertising," 23 Insurance Counsel J. 82, 97 (1956).

2. *Using the mails to defraud.* Where the mails have been used in a fraudulent way, the Department of Justice can initiate criminal prosecutions under sec. 1341 of Title 18 of the United States Code. Such prosecutions have been carried out. See e.g., *United States* v. *Sylvanus*, 192 F. 2d 96 (7th Cir. 1951), certiorari denied, 342 U.S. 943 (1951); *United States* v. *Minnec*, 104 F.2d 575 (7th Cir. 1939); *United States* v. *Littlejohn*, 96 F.2d 368 (7th Cir. 1938), certiorari denied, 304 U.S. 583 (1938). It is well-known that the power to prosecute for "mail fraud" is a powerful and effective remedy. This is, of course, peculiarly applicable to the mail-order insurance business, if this should be conducted in a fraudulent manner.

3. *Federal Trade Commission.* The Federal Trade Commission has broad power with respect to practices of persons engaged in interstate commerce, and it has expressly used those powers with respect to mail order insurance.

In May, 1949, public hearings were held in Washington by the Federal Trade Commission with respect to mail-order insurance. See Donovan, "Regulation of Insurance

under the McCarran Act," 15 Law and Contemporary Problems 473 (1950).

On February 3, 1950, the Federal Trade Commission promulgated trade practice rules relating to "Advertising and Sales Promotion of Mail order Insurance." These are Part 187 of Chapter 1 of Title 16 of the Code of Federal Regulations, and they were published in the Federal Register for February 3, 1950. 15 Fed. Reg. 599. In 1964 these were supplemented by "Guides for the Mail Order Insurance Industry," promulgated by the Federal Trade Commission on April 28, 1964, and effective on July 14, 1964. 29 Fed. Reg. 6381. See Hanson and Obenberger, "Mail Order Insurers: A Case Study in the Ability of the States to Regulate the Insurance Business," 50 Marquette L. Rev. 175, 209 (1966).

These rules may be enforced through cease and desist orders by the Commission. It was these rules which this Court held the Commission had the power to promulgate in *Federal Trade Commission* v. *Travelers Health Association,* 362 U.S. 293 (1960), on the ground that this power was retained by Federal authority under the McCarran-Ferguson Act, because "the States cannot for constitutional reasons regulate effectively" this element of the insurance business. 362 U.S. at 297, quoting from *Federal Trade Commission* v. *National Casualty Co.,* 357 U.S. 560, 564 (1958).

4. *State action.* One of the chief complaints against mail-order insurers has been that the insured had to go far away in the event of suit, and could only sue the company in its own home forum. That, of course, has been completely changed. Where the insured was living in the state when the policy was issued and he paid the premium by mail, he can sue the insurance company in his own state, if the state has passed a statute authorizing such a suit. *McGee* v. *In-*

ternational Life Insurance Co., 355 U.S. 220 (1957). Most states have passed such statutes, and Wisconsin has done so. Thus there is no problem about an insured in Wisconsin getting jurisdiction over the Appellant for a suit in the Wisconsin courts. Actually the present Appellant has not been a party to a suit in any state for many years (R.200), but it readily accepts the jurisdiction of the Wisconsin courts, and has expressly refrained from raising any question about this portion of the Wisconsin statute in the present case.

Moreover, the Appellant (and other mail-order insurance companies) are subject to effective state regulation. The Appellant is subject to regulation in Minnesota, where it regularly files reports and is subject to examination, and to the regulatory authority of the Minnesota Insurance Department.[3] The Appellant is not a fly-by-night operation. It has been domiciled in Minnesota for many years, and has faithfully met its obligations to policy-holders not only in Minnesota, but in other States and provinces, including Wisconsin. As far as the present Appellant is concerned, no question is raised in this case about preventing abuses. There have been none. If there is a problem about possible abuses in other cases, that could readily be taken care of by cooperation between the insurance departments of the several states. State regulation of mail-order insurance, through the state of domicile, is now effective, and can be made more effective, if that is needed.

Thus, it appears that the mail-order insurance business is now subject to extensive regulation, both state and federal. If there is need for greater state regulation, Congress should make the determination, through an exercise of its power to grant to the states a greater authority to regulate this segment of interstate commerce.

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[3] See Laws of Minnesota, Secs. 72.20-72.23.

VII

THE EFFECT OF SUSTAINING THE STATUTE IS TO MAKE IT DIFFICULT FOR SMALL AND SPECIALIZED COMPANIES TO COMPETE, AND THUS TO ACCENTUATE THE PROCESS BY WHICH BUSINESS ACTIVITY IN THIS COUNTRY IS TRANSFERRED FROM MANY SMALL COMPANIES TO A RELATIVELY FEW BIG ONES.

The companies concerned in this case are mostly small ones, doing specialized — and useful — business. These include Church Insurance Co., Catholic Relief Insurance Co., and the Appellant, Ministers Life and Casualty Union, which writes insurance for paid religious workers only. There is no need for the participation of agents in this process, and their intervention only needlessly increases the cost of providing insurance.

This method of doing business is similar to that of Savings Bank Life Insurance which was developed in Massachusetts under the leadership and urging of Louis B. Brandeis. Although this insurance is sold "over the counter" rather than by mail, one of the basic objectives was to hold down costs by eliminating the necessity of agents and thus saving for the insured the amount normally paid for the agent's commission. Savings Bank Life Insurance has now extended into New York and Connecticut, where it is sold by banks at reduced sales cost.

If mail-order insurance is made subject to taxation and regulation in states where the insurer has not qualified to do business, the costs of doing business will necessarily be increased, through the taxes payable, and through the costs of regulation, including the expenses of agents' commissions, under co-called "resident agents" laws which have been adopted by many of the states. The result will be that the small specialized company, such as the Appellant here, will find it difficult to compete with the large companies, which have vast resources, and extensive sales organizations. A large company can spread over millions of policies the costs of the record-keeping and paper work required in

making separate reports to all of the states in which it does business. Its volume is such that it can effectively realize the savings available to large-scale operations through modern computers and record-keeping and communications devices.

The smaller company, though offering a useful special service, cannot achieve the savings which come from operations in large volume. The cost of multiple compliance can become very burdensome to it, with the result that it is not able to provide as economical a service to its customers. In the course of time, there may remain little reason for its existence, and it may well be wise for its business to be absorbed into a larger company through reinsurance, merger, or otherwise. In this way, small business is swallowed up by big business, and smaller businesses tend to disappear from the scene. Perhaps these companies have led a sheltered life, but it has been a shelter which Congress has known, and has consistently refused to change. Is this not the sort of essential political judgment which should be left as Congress has chosen to make it?

What is the relevance of these considerations to this Court's role in this case? Certainly the policy of the country is well established, through many pieces of legislation (Sherman Act, Clayton Act, Small Business Administration, provisions of the Internal Revenue Code favoring small businesses, and Small Business Investment Corporations) in favor of encouraging small businesses, and looking with disfavor on legal pressures which tend to force small businesses into big ones. It is doubtful, therefore, that without some statutory warrant this Court should reach a decision which is, in its effect, contrary to this policy.

But the policy is even more relevant here, because the Court is here, in sum and substance, construing an Act of Congress — the McCarran-Ferguson Act — which has in the past uniformly been understood to protect the mail-

order insurance company, and in a situation where Congress has over a long period of years failed to change the statute or to allow the small companies to be taxed or regulated by the states, and this inaction by Congress has at least twice been confirmed by this Court. *Federal Trade Commission* v. *Travelers Health Association*, 362. U.S. 293 (1960); *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962).

May it not be that the reason Congress has consistently refrained from granting to the States the power to regulate and tax these mail-order companies, and specialized companies generally, which can effectively conduct their operations by mail, without the intervention of agents, is its desire not to interfere with the operation of these companies — though it has been repeatedly requested to do so? Is this not a relevant factor in determining the proper construction of the statute now before the Court? Should this Court in effect amend without a hearing the statutory arrangements set up and long accepted by Congress?

CONCLUSION

For these reasons, it is respectfully submitted that this Petition for a Rehearing should be granted, and that probable jurisdiction should be noted in this case, and the case set down for oral argument.

ERWIN N. GRISWOLD
Langdell Hall
Cambridge, Massachusetts
Counsel for Appelant

FRANK A. ROSS
1 South Pinckney Street
Madison, Wisconsin
Of Counsel

December, 1966

I certify that this Petition for Rehearing is presented in good faith and not for delay.

ERWIN N. GRISWOLD
Counsel for Appellant

APPENDIX

Act of September 14, 1959, P.L. 86-272, 75 Stat. 555-556 (United States Code, Title 15, sec. 381)

AN ACT

Relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I — IMPOSITION OF MINIMUM STANDARD

SEC. 101. (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from solicitation are orders described in paragraph (1).

(b) The provisions of subsection (a) shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to —

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

(c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) For purposes of this section — —

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

[Section 201 and Title II are omitted.]

CERTIFICATE OF SERVICE

I, Erwin N. Griswold, attorney for the Ministers Life and Casualty Union, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28th day of December, 1966, I served copies of the foregoing Petition for a Rehearing, pursuant to Rule 33 of the Rules of the Supreme Court, by causing copies thereof to be deposited in a United States Post Office or mail box with air mail postage prepaid, addressed to counsel of record for the appellees at Room 114 East, State Capitol, Madison, Wisconsin 53702.

ERWIN N. GRISWOLD,
Attorney for Ministers Life and Casualty Union